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## TRIBUTE TO JUDGE RHESA HAWKINS BARKSDALE


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## RECENT DECISION

CIVIL RIGHTS—EMPLOYMENT—BEFORE AN EMPLOYER MAY LAWFULLY TAKE RACE-BASED ACTION TO REMEDY A PRACTICE THAT HAS A DISPARATE IMPACT, THE EMPLOYER MUST HAVE A STRONG BASIS IN EVIDENCE TO BELIEVE THAT IT WILL BE SUBJECT TO DISPARATE-IMPACT LIABILITY IF IT FAILS TO TAKE THAT ACTION
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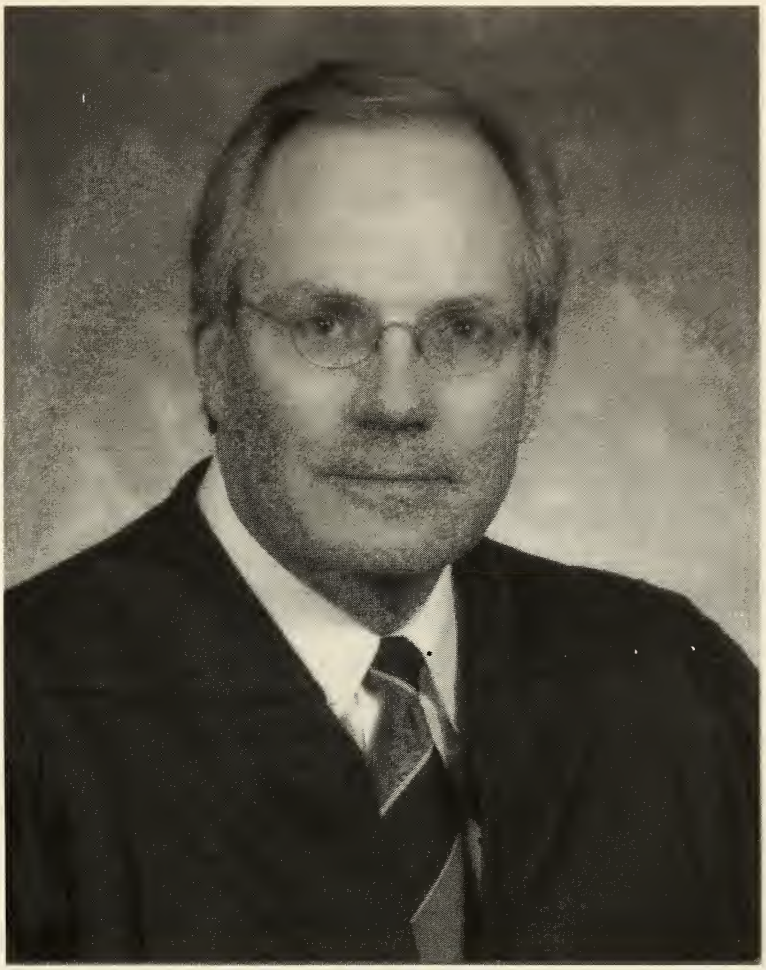
# Tribute



Judge Rhesa Hawkins Barksdale
U.S. Court of Appeals for the Fifth Circuit

# FOREWORD

*Chief Judge Edith H. Jones,*
*U.S. Court of Appeals for the Fifth Circuit*

Judge Barksdale's former clerks approached me last summer with a request to write an introduction, as Chief Judge of the Fifth Circuit, to these articles and recollections honoring the Judge's career as he assumes senior status on our court. Like Judge Jolly, I do not consider a judge's senior status to be as much a milestone as a gateway to a new phase of judicial responsibility. Judge Barksdale became eligible on his sixty-fifth birthday, having served in an active duty status for over fifteen years, to ascend to senior status, and he elected to do so. In that position, he will continue to hear appeals as he chooses to do so, he will have a full staff for his purposes, and he will participate in court activities and functions. He will also be viewed by his colleagues and the new judges, who will inevitably join our court, as a voice of experience, as this court has always prized the assistance of our senior colleagues. While senior status offers the Judge an opportunity to enjoy his family or hone new and old talents, free of the relentless press of this very busy court's workload, I am confident that Judge Barksdale will continue to contribute to our decisions.

The writings that follow are offered by two of our judicial colleagues, one longtime friend, and three former law clerks who have become professors of law. They shed light not only on Judge Barksdale's career, but also by extension on the careers of all federal judges. Few of us will be privileged to see in print thoughtful summaries of our decisions, amusing anecdotes of our early lives, or reminiscences about the serendipitous events that led us to the federal bench. Yet, with some notable exceptions that I shall mention, there are parallels here to our collective experiences that are worth memorializing. For instance, for many federal judges appointed in recent decades, the path to confirmation was neither fast nor without bumps. Another commonality, as the warmth of the Judge's former clerks attest, is that law clerks are deeply influenced by the judges they serve.

The relationships we build and impact we have on our clerks is without a doubt one of the most satisfying aspects of being on the bench. The articles describing Judge Barksdale's opinions demonstrate how we are all ultimately judged, by the legal profession, academia, and our judicial peers, for our diligence, integrity, clarity of expression, and analytical precision.

It may also be said concerning most of us, as one of these commentators says of Judge Barksdale, that our judicial philosophy does not leap fully explained from the pages of our opinions. Instead, one must digest the opinions and uncover inductively the principles that shape our decisions. And even then, consistency may seem elusive for many reasons, including the force of precedent, the factual and procedural quirks in a trial court record, or the competency and approach of counsel. Two of our court's brightest judges, John Minor Wisdom and Tom Gee, startled me at lunch one day years ago when each of them disavowed having a particular legal philosophy. With additional experience, I now understand what they meant. We are tasked to employ rules of decision making that spring from our legal heritage. When correctly followed, these rules, ranging from standards of appellate review, to deference to the legislature or regulatory agency, to respect for written texts, usually determine the outcome of appeals. One's judicial philosophy should not overwhelm one's respect for the rules, else it becomes judicial whim. A judge may have a brilliant judicial philosophy, but if the judge conscientiously applies the fundamental rules of decision-making, it is his craftsmanship, not his philosophy, that will be on display. And so it has been with Judge Barksdale.

The singularities of Judge Barksdale's career evident in these writings describe both the man and the judge, so intertwined are his experiences and performance on the bench. First, his military service indelibly affected his outlook as it has the details of his interaction with clerks and colleagues. To take one small example, not many judges call our clerks "lieutenants," but then hardly any of us earned the right to do that through hard battlefield service. Second, Judge Barksdale is one of a select few federal judges who served as law clerks on the U.S. Supreme Court. His oft-repeated stories about his magical year

with Justice Byron White are emblems of his personal history and of his approach to judging and being a judge. Third, the Barksdale family, as it was and is, instilled in him tribal loyalty and a compulsion to succeed. Fourth, although it may be only implicit in these tributes, the State of Mississippi casts its spell over Judge Barksdale's personality and career. This is not the place to analyze the unique attributes of the state or its citizens; suffice it to say that I have found during my tenure on our court that the characteristics of life in Mississippi have encouraged a disproportionate number of its citizens to excel in law, business, the learned professions, and political life. Judge Barksdale plainly benefited from his opportunity for success, as he benefited from Mississippians' great story-telling ability.

With this introduction, I trust the reader is poised to enter into the mind of Judge Rhesa Barksdale, as revealed by those who know him well.

# TRIBUTE TO JUDGE RHESA H. BARKSDALE

*Judge E. Grady Jolly,*
*U.S Court of Appeals for the Fifth Circuit*

When Judge Barksdale came to the court, I was well acquainted with him on a personal and professional level. I had known him from the moment he first started practicing law and had known his brothers before him; all had reputations for ability and achievement in school and after. I had practiced with his youngest brother, whose coruscating intellect I have always admired. In the practice of law Judge Barksdale lived up to his family reputation, and to the expectations of those of us who knew him as the top graduate of the Ole Miss Law School and as a United States Supreme Court law clerk. Thus, when Judge Barksdale joined the court in 1990, I expected that he would be a first class judge. I have not been disappointed. No one on our court has worked harder or with more focus. The opinions that he has produced have been superior. On the occasions when we sit together, and Judge Barksdale submits a draft opinion for my concurrence, I do not entertain the slightest doubt about the depth of its legal research, the preciseness of its reasoning, or its comprehensive understanding of the record. Any judge on our court who challenges his views of the law or of a particular case undertakes a daunting task.

Judge Barksdale's service on the United States Court of Appeals for the Fifth Circuit has most certainly enhanced the reputation of the court and has made the state of Mississippi proud of its son. For almost twenty years, I have valued his counsel and his friendship on this court. Because his taking senior status means that he has only partially retired, I look forward to our collegial and personal association for many years to come.

# JUDGE RHESA H. BARKSDALE: A TRIBUTE TO A DISTINGUISHED GRADUATE OF THE OLE MISS LAW SCHOOL

*David W. Case**

United States Fifth Circuit Court of Appeals Judge Rhesa Hawkins Barksdale is one of the most distinguished and successful graduates in the history of the University of Mississippi School of Law. In the fall of 2008, Judge Barksdale shared the news with his many former law clerks that in August 2009 he would take senior status on the occasion of his sixty-fifth birthday. Within minutes of learning of his decision, my colleague Professor Chris Green and I, both former law clerks to the Judge, began organizing this *Mississippi Law Journal* tribute. As members of the faculty of the Judge's law school alma mater, we felt a special responsibility to ensure the publication of a worthy tribute to a remarkable career and an even more remarkable individual. Moreover, because the Judge was a member of this publication's editorial board during his law school career, Professor Green and I believed it important and especially fitting for this tribute to be published in the *Mississippi Law Journal*.

The Judge's announcement came as a surprise to his former clerks, a group that has grown considerably since he first joined the Fifth Circuit bench on April 1, 1990. The opportunity to become part of an extended family of former and future clerks is a special privilege of a judicial clerkship, and that experience has been especially vibrant and rewarding for the clerks of Judge Barksdale. The Judge has gone to great, and very much appreciated, lengths to foster a feeling of warmth and family in his

* Associate Professor of Law, University of Mississippi School of Law. B.A., J.D., University of Mississippi; LL.M., Columbia University; Ph.D., Vanderbilt University. The author served as a law clerk to Judge Barksdale during 1991-1992. Many details in this essay regarding Judge Barksdale's life and career were gleaned from an outstanding profile written by Bob Frey in the January 2008 issue of *The Federal Lawyer*. *See* Bob Frey, *Judicial Profile: Hon. Rhesa Hawkins Barksdale: U.S. Circuit Judge, U.S. Court of Appeals for the Fifth Circuit*, FED. LAW., Jan. 2008, at 34.

former clerks by taking a deep-seated personal interest in our lives and careers both during and following our clerkships. Each year on our birthday the Judge, without fail, delights us by contacting us to extend good tidings on the special day.[1] He routinely reaches out to convey congratulations on special occasions such as weddings, the birth of children, or the beginning of new jobs. Over the last two decades we have had many marvelous reunions, dinners, and other special gatherings together with the Judge, his chambers staff, and current and former law clerks in both Jackson, Mississippi, and New Orleans. In our time on the Ole Miss faculty, Professor Green and I and our spouses also have had the wonderful honor of spending time with the Judge and his wife Claire when he has been at Ole Miss for sittings of the Fifth Circuit at the law school.

From this frequent contact, we former clerks know that Judge Barksdale exudes the same high energy, drive, and intensity as in his first days on the bench. He could easily serve another decade and more on active status, and thus this milestone, most certainly for his former clerks, has come far sooner than expected. The Judge's move to senior status is, "needless to say,"[2] a richly deserved honor coming as it does after a long and especially distinguished legal and judicial career. However, our happiness on this special occasion may be tempered the slightest bit by self-reflection on what this milestone suggests about how far down the path we have come in the journeys of our own respective lives and careers.[3] This may be especially true for those of us who, as I did, clerked for the Judge in his earliest years on the court. Simply put, although the Judge was clearly ready to take this step, perhaps his extended chambers family

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[1] I was privileged to serve as one of the Judge's clerks on his second year on the Fifth Circuit. Thus far, I have received seventeen such "birthday calls" from the Judge and look forward to many, many more.

[2] Here, I am quoting the Judge in published and unpublished opinions far too numerous to cite in a single footnote.

[3] My clerkship with the Judge in 1991–1992 was a critical first step in transitioning from a career in private law practice to my present career as a law professor. The opportunity that the Judge provided in hiring me as his law clerk was the single most important factor in that journey's eventual successful conclusion. I have thanked him often over the years for opening the door for me, but I can never thank him enough. For more, see David W. Case, *The Pedagogical Don Quixote de la Mississippi*, 33 U. MEM. L. REV. 529, 540, 542 (2003).

was not quite so ready for him to do so. An era that meant so much to us on a deeply personal level is now ended, adding a tinge of bittersweet flavor to an otherwise joyous occasion. Our high esteem, admiration, and everlasting affection for him, however, allow us to unreservedly celebrate with him as "our Judge" moves to this new phase of his truly extraordinary career.

Judge Barksdale was born on August 8, 1944 in Jackson, Mississippi, the fourth of six sons of John and Mary Barksdale. The Judge talks often of growing up as one of six brothers—in order, Jack, Tom, James, Rhesa, Bryan, and Claiborne—and how his parents fostered a healthy sense of ambition and drive among them. The Barksdales' nurturing of their sons' natural talents paid extreme dividends as all six have achieved exceptional success in their respective lives and careers.[4] In a foreshadowing of his future military career, the Judge's parents named him for a great-grandfather—Rhesa Hawkins Barksdale—who served in the Confederate Army. The Judge's great-grandfather was wounded in Maryland during the Battle of Sharpsburg in 1862, and was later captured in Pennsylvania on July 3, 1863, during Picket's charge on the last day of the Battle of Gettysburg. He was imprisoned at Fort Delaware until his release on June 11, 1865, after agreeing to sign an oath pledging loyalty and allegiance to the Union. Rhesa Hawkins Barksdale's oath of allegiance is now prominently displayed on the wall of his great-grandson's chambers in Jackson.[5]

As both an alumnus and member of the university's faculty, I am well aware and immensely appreciative of the Barksdale family's deep roots at Ole Miss. In addition to the Judge's ma-

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[4] Bob Frey captures this well in his profile of Judge Barksdale in *The Federal Lawyer*:

> [T]he judge's parents . . . instilled in their six boys a love of family, education, sports, church, and excellence. And all six were proof of their parents' training: Jack, the oldest, had an outstanding career with IBM; Tom, two years younger, was a highly successful banker; the next child, Jim, founded Netscape and later, the Barksdale Reading Institute at Ole Miss; the judge's younger brother, Bryan, is a cardiologist; and Claiborne, the youngest boy, is a lawyer who now heads the Reading Institute.

Frey, *supra* note *, at 42.

[5] *See id.* at 34.

triculation at the law school, both of his parents and all five of his brothers attended Ole Miss. Thus far, six children of the Barksdale brothers are among the latest generation of Barksdales who have attended the university. This includes three who have attended the law school—James' daughter Susan Barksdale Howorth, and the Judge's two children, daughter Trhesa Barksdale Patterson and son Russell Barksdale (whom I have been privileged to teach in my classes). Numerous spouses and in-laws among the Barksdale family have also attended Ole Miss, including the Judge's brother-in-law Rob Jones (brother of his wife Claire), also a graduate of the law school.

Importantly, however, the relationship between Ole Miss and the Barksdale family extends well beyond, and well after, the attendance of individual family members at the university. The Judge's brother Bryan is a past president of the University of Mississippi Alumni Association and is currently a professor of cardiovascular medicine at the University of Mississippi Medical Center. The Judge's brother James, former president and chief executive officer of Netscape Communications Corporation, was inducted into the University of Mississippi Alumni Hall of Fame in 1996. One of the most important events in the university's history occurred in 1997 when James, together with his late wife Sally, donated $5.4 million to establish the Sally McDonnell Barksdale Honors College at Ole Miss. In 2000, in a further act of immense generosity, James and Sally Barksdale made a $100 million gift to the University of Mississippi Foundation to create the Barksdale Reading Institute for the purpose of improving the literacy skills of Mississippi schoolchildren. The Judge's brother Claiborne, also a graduate of the Ole Miss Law School,[6] is currently the chief executive officer of the Barksdale Reading Institute. To say that the Barksdale family has positively impacted their shared alma mater is a monumental understatement.

Notwithstanding his strong family connections to the university, however, the Judge followed a different call—that of

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[6] Claiborne Barksdale graduated from the law school in 1974 and later clerked for Judge E. Grady Jolly on the Fifth Circuit, one of the Judge's Mississippi colleagues on the Fifth Circuit for the past two decades and a contributor to this tribute.

service to country—in deciding where to pursue his college education. In 1962, the Judge accepted an appointment to the United States Military Academy, following in the footsteps of his Uncle Battle Barksdale, a member of the West Point class of 1937.[7] Judge Barksdale graduated in 1966 in the top fifteen percent of his class at West Point, and his numerous activities included the Glee Club and the Cadet Chapel Choir, Brigade Boxing, the Student Conference on United States Affairs, and service as head manager of the academy's football team.

For the cadets of the West Point class of 1966, however, the omnipresent backdrop for the entirety of their college experience was the ongoing war in Vietnam. The news media of the day took a strong interest in the roles many in the Corps of Cadets would undertake in Vietnam following graduation. Ten members of the Judge's graduating class, including Judge Barksdale, were profiled in *Newsweek* magazine in July 1967 regarding their respective preparations and training for combat operations. Poignantly, *Newsweek* observed in that feature that "[t]he cadets of the class of 1966 . . . had . . . come to see their own personal destinies as being inextricably linked to Vietnam."[8] Judge Barksdale volunteered for service in Vietnam, as did the majority of his classmates.[9] Indeed, so many of the class of 1966 volunteered for combat that the Army developed a quota system based on class standing to decide which graduates would serve their first tour of duty in Vietnam. Judge Barksdale was a part of this first group. Quoted in a *New York Times* article published the day prior to his graduation, the Judge described his decision to volunteer for combat as "something I have to do because I have an obligation to this country."[10]

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[7] Like his nephew, Battle Barksdale had a distinguished military career following his graduation from West Point. He served in the United States Army for twenty years, retiring in 1957 as a Colonel. Battle Barksdale was stationed in Hawaii during the surprise attack on Pearl Harbor and other military installations on December 7, 1941. In addition, Colonel Barksdale served as a battalion commander in the European Theater during World War II. He also commanded an American artillery battalion and later was advisor to a South Korean artillery unit during the Korean War.

[8] *West Point Goes to War*, NEWSWEEK, July 10, 1967, at 54.

[9] *Id.*; Douglas Robinson, *West Point Class of '66 Eager to Fight*, N.Y. TIMES, June 8, 1966, at 34.

[10] Robinson, *supra* note 9, at 34.

Months of training, including completion of Airborne and Ranger schools, followed graduation, and, in August 1967, Lieutenant Barksdale arrived in Vietnam. The Judge initially commanded a platoon in the First Squadron, Army's First Armored Calvary Regiment, with responsibility for fifty-four men, three tanks, and six personnel carriers. The squadron was committed to battle a mere two days after its arrival in Vietnam. The following month, a land mine exploded under the Judge's armored personnel carrier during a patrol, killing his driver and wounding everyone inside. Lieutenant Barksdale was later awarded the Bronze Star for valor for his role in organizing a defense and aiding the wounded in the aftermath of the explosion.[11] Following this early brush with death, the Judge's service in Vietnam continued to personify courage and honor. On December 3, 1967, his troop's base camp was overrun by enemy troops. He was subsequently awarded the Silver Star for commanding the defense that thwarted the attack and drove off the enemy.[12]

Other commendations received by the Judge for his combat service include the Purple Heart, a Bronze Star for meritorious service, and the Vietnamese Cross of Gallantry with Silver Star. He received two promotions during his tour of duty in Vietnam, first to troop executive officer and later to assistant division operations officer. Many in Judge Barksdale's West Point graduating class paid the ultimate price for their dedication to country and service in the war. In all, thirty members of the class of 1966 were killed in Vietnam, the highest number of any class of cadets in that war. A plaque bearing the names of his West Point classmates killed in Vietnam hangs in the Judge's chambers in Jackson.[13]

Following his return to the United States in July 1968, Judge Barksdale completed his military service as an ROTC instructor and assistant professor of military science at the University of Akron. Significantly, it was at this time that the Judge began his legal career by attending law school at night at Akron. The Judge completed his service in the Army in 1970

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[11] Frey, *supra* note *, at 35.
[12] *Id.*
[13] *Id.*

with a final rank of Captain. Upon his separation from the Army, the Judge returned to Mississippi to continue his legal education at the University of Mississippi.

The Judge's law school career at Ole Miss was a study in the pursuit of excellence. He was the comment editor of the *Mississippi Law Journal*, and his student note was selected for publication in the *Journal*.[14] Impressively, as a law student, Judge Barksdale also co-authored an influential law review article with a member of the law school faculty critically analyzing the status of Mississippi products liability law.[15] The Judge graduated first in his law school class in 1972, earning the Dean Robert J. Farley Award, presented annually to the student graduating with the highest academic average in the class. The law school faculty also selected Judge Barksdale for the Phi Delta Phi Award as the outstanding graduate in his class. A plaque listing the names of previous Phi Delta Phi Award winners hangs in the main entrance to the Lamar Law Center on the Ole Miss campus. The plaque's inscription aptly captures the essence of the Judge's law school career, noting that the honor is extended annually by the law school faculty to that graduating senior who "best exemplified the attributes indicative of the successful lawyer, of character, scholarship, personality, and general ability."

Following law school, Judge Barksdale served as a law clerk to United States Supreme Court Justice Byron White, becoming one of only three graduates in the history of the Ole Miss Law School to clerk on the Court.[16] Judge Barksdale often speaks of his admiration, respect, and affection for Justice White and the profound influence his clerkship with the Justice has had on his own judicial career. In a 1993 *Harvard Law Review* essay written to honor the occasion of Justice White's retirement from the Court, Judge Barksdale observed:

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[14] Rhesa H. Barksdale, Note, D.W. Boutwell Butane Co. v. Smith – *Employee Exoneration with Employer Liability – An Anomaly*, 42 MISS. L.J. 515 (1971).

[15] Frank L. Maraist & Rhesa H. Barksdale, *Mississippi Products Liability – A Critical Analysis*, 43 MISS. L.J. 139 (1972).

[16] The other graduates of the law school who have served as Supreme Court clerks are Raymond L. Brown (class of 1962 – Justice Tom Clark) and W. Wayne Drinkwater, Jr. (class of 1974 – Justice Warren Burger).

> [M]y service on the federal bench perhaps provides me with additional appreciation for his qualities as a judge. The lasting impression from working for Justice White was such that, although seventeen years elapsed between ending service to him and beginning service as a judge, my first day in the latter seemed only one day removed from the former. (That feeling was also experienced by another of his former clerks who became a federal judge.) My chambers, for the most part, are patterned after his; it is my hope that my clerks have some modicum of the feeling of collegiality, mutual respect, professionalism, and team effort that Justice White engendered in his chambers.[17]

I am confident that I do not overstep my bounds by responding to the implicit query raised in the passage above on behalf of the entire family of former Barksdale clerks. Working for Judge Barksdale was indeed a tremendously rewarding personal and professional experience. He treated us with respect and as valued colleagues—his "lieutenants" the West Point graduate and former Army Ranger would often call us.[18] He actively solicited our input on pending cases and encouraged us to be candid with our views. He patiently mentored us not only for the purpose of accomplishing the important work of the chambers, which as a team under his guidance we did efficiently and well, but also with an eye towards enhancing the quality of our future professional careers. My career as both an attorney and law professor has been influenced in ways too numerous to list by what I learned from the Judge during the year of my clerkship. I am certainly not unique in that regard among his former clerks; as a group we are universally in his debt for what he taught us during our service. I have no doubt that the wonderful quality of our experience as clerks for Judge Barksdale was directly correlated to the extremely rich and rewarding experience of the Judge's own clerkship with Justice White. For that, we

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[17] Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 5 (1993) [hereinafter Barksdale, *Justice White*].

[18] The Judge would also sometimes refer to my co-clerks—Lynn Ladner and Jim Boswell—and me as "men" in the sense of us constituting his "troops." To stave off any confusion we might collectively have relating to the use of that term in relation to Lynn, the Judge assured us that in the context of our clerkship, as in the Army, the term "men" was entirely gender neutral.

former clerks of the Judge also owe Justice White a debt of profound gratitude.

Following his clerkship, Judge Barksdale spent seventeen years in private law practice with the Jackson, Mississippi firm of Butler, Snow, O'Mara, Stevens & Cannada. His practice focused primarily on commercial litigation, but he handled numerous other types of cases as well, including First Amendment work for the Jackson newspaper. Not surprising as a former military officer, he was committed to service to his communities outside of his law practice. Thus, the Judge found time in his busy schedule to teach constitutional law at the Mississippi College School of Law and the University of Mississippi's paralegal program in Jackson. He also volunteered on behalf of the Arthritis Foundation, St. James Episcopal Church, and the St. Andrews school, and served as chairman of the Mississippi Vietnam Veteran's Leadership Program from 1982 to 1985. The Judge was also active in state politics, serving on the executive committee of the Mississippi Republican Party, as a delegate to the Republican National Convention in 1988, and as one of Mississippi's presidential electors in the Electoral College following the 1988 presidential election.

In 1989, the Judge was nominated to the Fifth Circuit by President George H. W. Bush. He received his commission on March 12, 1990 and began serving on April 1, 1990. His seat on the court had previously been held by Judge Alvin Rubin of Louisiana. During my clerkship, the Judge spoke often of his admiration of Judge Rubin and took considerable pride in having been appointed to fill his seat. Judge Rubin was appointed to the seat in 1977 when the previous holder of the seat, Judge John Minor Wisdom, took senior status. In a 2000 tribute memorializing Judge Wisdom in the *Mississippi College Law Review*, Judge Barksdale recounted that Judge Rubin had named the seat the "Wisdom Seat."[19] The Judge was a great admirer of Judge Wisdom and considered it his "good fortune" to have inherited the "Wisdom Seat" from Judge Rubin.[20]

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[19] Rhesa Hawkins Barksdale, *Tribute to John Minor Wisdom*, 20 MISS. C. L. REV. 235, 235 (2000).

[20] *Id.*

A unique expression of his admiration of Judge Wisdom was the Judge's practice of giving his clerks the same writing instructions—"Wisdom's Idiosyncrasies"—at the start of their clerkships that Judge Wisdom gave to his.[21] I still recall receiving my copy of "Wisdom's Idiosyncrasies" from the Judge in the summer of 1991, and, nearly two decades later, my writing continues to be influenced by the lessons gleaned from them. During my clerkship, I recall the excitement that permeated the entire chambers when the Judge announced, with considerable delight, that he had been assigned to a panel that included Senior Judge Wisdom. Judge Wisdom was a giant of the federal judiciary, and, as Judge Barksdale emphasized with generous affection in his tribute to the great judge, the Fifth Circuit courthouse was "named so appropriately for him in 1994."[22]

Judge Barksdale's respect for the great jurists that preceded him on the Fifth Circuit was a lesson by example that was certainly not lost on his law clerks. Similarly, Judge Barksdale demonstrated on a daily basis his equal admiration of the Fifth Circuit colleagues with whom he served. He is effusive in his praise for the judges and staff of the court in the performance of their duties. Quoted in a 2008 profile in *The Federal Lawyer*, Judge Barksdale emphasized that "[e]very person, in every position" on the court performs "superbly."[23] The Judge understands well the critical importance of collegiality to the proper functioning of an appellate court and at this aspect of his service on the Fifth Circuit he has excelled. In his *Harvard Law Review* tribute, Judge Barksdale discussed this quality in Justice White:

> He got along with all of [the Justices with whom he served]; he made it a point to. And, whatever their backgrounds or legal persuasion, they liked him. He was never personal in his opinions, and was always gracious and thoughtful in his dealings with each member of the Court.[24]

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[21] *Id.* at 237.
[22] *Id.* at 235.
[23] Frey, *supra* note *, at 42.
[24] Barksdale, *Justice White*, *supra* note 17, at 7.

Although describing the Justice for whom he clerked, these words apply with equal weight to Judge Barksdale and the manner in which he conducts himself in his service as a federal judge. For the Judge, collegiality is certainly about respect and kindness for his fellow judges and the staff of the court, but it is also about his devotion to the institution that they all serve. By treating his colleagues with graciousness and respect, he does honor to the court he serves. For a man who has lived the majority of his adult life in service to his country, this is no small matter.

A specific example of the Judge's kindness and good heart involves a personal anecdote. Some years following my clerkship, I had the opportunity that all judicial clerks should experience at least once—the chance to make an argument before the judge for whom he or she previously clerked. The day before my scheduled oral argument in New Orleans, I called the clerk's office to determine who was assigned to the panel. When I heard Judge Barksdale's name, I immediately knew two things with absolute certainty. First, having observed the Judge during dozens of oral arguments during my clerkship, I knew the first question I would get from the bench would come from him. I also knew that this question would "cut to the chase"; that is, go straight to the heart of the Judge's view of the most important potential vulnerabilities in my argument as reflected in his careful and exacting evaluation of the briefs. Indeed, this is but another way in which Judge Barksdale follows the example set by Justice White, of whom the Judge has praised for:

> [H]is active participation at oral argument, where his insightful, penetrating questions are designed to bring the real issues into sharp focus, to try to find answers to questions prompted by the briefs. As he has said, he does not view oral argument as a means of giving due process to counsel, but as a means of trying to better understand the case.[25]

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[25] *Id.* at 6. Judge Barksdale believes strongly in the critical importance of oral argument being productive and adding value to the court's ability to understand the issues and appropriately resolve the case. Regarding this, he has emphasized:

> At oral argument, time is short and the court is focused on the issues at hand. (On our court, a great deal of time and effort is invested in preparing for it.)

Again, although he applied these words in tribute to Justice White, they further describe with equal effectiveness another of the many qualities that make Judge Barksdale an outstanding appellate judge.

The second thing I knew instinctively upon learning I would argue before the Judge was that he would go out of his way to treat me as he would any other advocate appearing before him. Said another way, there most certainly would be no "taking it easy on me" as one of his former clerks. My prediction on both counts proved deadly accurate. Only a few minutes into my argument, the Judge raised the question that, for him, I would need to satisfactorily answer in order to convince him that my client's position on the merits should prevail. Having suffered a dismissal in the trial court on summary judgment, I already knew I had a serious uphill climb, but the Judge's question put me on immediate notice that the hill was even larger than I had envisioned. I began the effort to persuade him that his concern should not affect my argument that a material factual dispute was present that necessitated a trial. In other words, although a loss on the merits might eventually be in my client's future, I argued that loss should come at the hands of a jury rather than the trial judge.

My familiarity with the Judge's tone and body language was probably an advantage, but that familiarity was also probably unneeded to perceive that I was not winning him over. Instinctively, I began addressing myself to the other two members of the panel, hoping that the Judge's problem with my argument would eventually be expressed in a dissenting opinion. Alas, it was not. As I later jokingly expressed to the Judge, when virtually no questions were asked during my opposing counsel's argument, I considered the possibility that the panel's

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> The court wants – indeed needs – input from counsel. Among other objectives, the court wants to test or challenge the strength or logic of positions advanced by counsel, and it attempts to receive that assistance, or achieve that purpose, primarily through answers to its questions. . . . Questions by the appellate court provide an excellent means for counsel to highlight and explain the points considered critical by the court.

Rhesa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 575 (1999) [hereinafter Barksdale, *Civility*].

affirmance of the lower court might actually beat me back to my office before I could complete the drive from New Orleans to Jackson, Mississippi. It did not arrive quite so quickly, but an order of affirmance without written opinion arrived in my mail in relatively short order.

Several weeks later, the Judge's staff and current law clerks and several former clerks gathered together with the Judge in chambers for our annual celebration of the anniversary of his joining the Fifth Circuit in 1990. The subject of my argument before the Judge was raised, and I shared my experiences with the group of standing on the other side on the bench from "our Judge." With considerable kindness and warmth, the Judge informed the group that I had made a very good argument on behalf of my client, especially given the obvious challenges I had faced. In what is high praise coming from him, the Judge announced to the assembled group that I had "served my client's interests extremely well." I was touched, and remain touched to this day, by the Judge's desire that everyone know his high opinion of my performance as an advocate before the Fifth Circuit bench. The Judge also touched me by relating an amusing exchange with one of the other judges on the panel who, after learning during the post-argument conference that I was a former law clerk to the Judge, suggested with some emphasis that, in that case, perhaps the Judge indeed had been a "bit hard" on me. I disagreed with that assessment, of course. The Judge showed me great respect by treating me not merely as a former clerk, but as "a true lawyer [and] a true professional" and engaging with me fully in the professional dialogue so critical to appellate advocacy.[26]

Serving as a law clerk to Judge Barksdale was one of the most deeply rewarding experiences of my life. Almost two decades later, I cannot imagine what my life and career might have been without that wonderful opportunity and his profound influence on me. I am tremendously proud of having been among his first law clerks on the Fifth Circuit and, as I am fond of mentioning at our clerk reunions, his very first clerk from the Ole Miss Law School, our shared alma mater. He is a gentle-

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[26] Barksdale, *Civility*, *supra* note 25, at 577.

man, a scholar, a great man, a kind soul, a wonderful mentor to young lawyers, a true professional with the highest of standards, and has indeed lived "a life marked by excellence."[27] The Judge's life has been one of exceptional achievement and a true personification of the West Point motto, "Duty, Honor, Country."[28] Both of his alma maters—West Point and the University of Mississippi—must be extraordinarily proud of having produced such a shining example of excellence, dedication, and selfless service to our country.

Fortunately, that service is not over. Although no longer an active duty member of the court, Senior Judge Barksdale will continue making valuable contributions to performance of the important work of the Fifth Circuit. He will continue to take an active role in oral arguments, write meaningful opinions,[29] inspire young law clerks, and exude those qualities that combine to make him an outstanding jurist. We are not saying farewell to "our Judge," simply congratulations on a well deserved honor and best wishes for many more years of magnificent service in his new role.[30] We also say, thank you.

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[27] Barksdale, *Justice White*, *supra* note 17, at 7. Once again, I take the liberty of describing the Judge by utilizing his own words in describing Justice White.

[28] United States Military Academy, *The U.S. Military Academy Coat of Arms and Motto*, http://www.usma.edu/PublicAffairs/Press_Kit_files/CoatArms.htm.

[29] For excellent discussions of notable opinions authored by the Judge, see Christopher R. Green, *Some Themes From Judge Rhesa H. Barksdale's Published Opinions*, 79 MISS. L.J. 261 (2010) and Andrew C. W. Lund, *The Importance of Lawyers in Judge Barksdale's Writings*, 79 MISS. L.J. 301 (2010).

[30] Recently, the Judge has himself suggested that we can look forward to a lengthy future of additional years of service by him on the Fifth Circuit bench. In an article published in the Jackson, Mississippi newspaper regarding his decision to take senior status, Judge Barksdale is quoted as follows: "I will continue to serve on the bench until I die. I consider myself blessed to serve in the federal judiciary." Jimmie E. Gates, *Appellate Judge Cutting Workload*, CLARION-LEDGER, Sept. 13, 2009, at B1. When I asked about this quote in a recent conversation with the Judge, he stated that the reporter neglected to include *everything* he had said on this subject. Following his statement regarding how long he intended to continue to serve, the Judge had added the qualifier "which I hope is a very long time from now" that, for whatever reason, did not make it into print. Needless to say, and again speaking for the entire family of Barksdale clerks, we fervently share his hope and see this in its entirety as extremely good news.

# THE JOURNEY OF RHESA H. BARKSDALE TO THE FIFTH CIRCUIT: A FRIEND'S PERSPECTIVE

*Judge Leslie H. Southwick,*
*U.S. Court of Appeals for the Fifth Circuit*

Tributes to Rhesa Hawkins Barksdale can enthusiastically be prepared from many perspectives. Judge Barksdale has inspired law clerks by his character and ability, persuaded other judges by his reasoning and hard work, and impressed law professors by the insights and style of his opinions. My thoughts on this extraordinary man have been shaped by a different relationship than those.

I will speak of Rees from the fortunate vantage point of a friend. Our friendship had its origins in our being in the same legal community, was nurtured by our work together in two political campaigns over twenty years ago, then fully blossomed as we shared in the difficulties that can arise when the goal is appointment to a federal circuit court. My principal focus will be on Rees's five-year journey in the 1980's toward his nomination to the Fifth Circuit. As observer, confidant, and, occasionally, aider and abettor in that enterprise, I learned much about his character.

When our roles were later reversed, he sustained me to a near-heroic degree. That taught me even more about him. "Duty, Honor, Country" is the motto of his beloved alma mater, the United States Military Academy at West Point.[1] All three words embrace the obligation of brotherhood that Rees has faithfully upheld.

Early on, our strong connection was our shared political interests. In 1984, we both attended the national convention in Dallas in which Ronald Reagan and George Bush were renomi-

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[1] RICK ATKINSON, THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT'S CLASS OF 1966 31 (Henry Holt 1989). Barksdale, as a member of the 1966 class, was quoted as saying that he looked forward to going to Vietnam because he had a duty to perform. *Id.* at 146.

nated. In 1987, our joint work became particularly close when two political campaigns overlapped. The first was a race for governor. We both supported Jack Reed of Tupelo, who had been a tireless proponent of public education in northeast Mississippi in the 1960's and 1970's, when integration of schools was at its most contentious. Jack was public-spirited, smart, articulate, and not one to take himself too seriously. Rees and I both thought he would be a splendid governor.

During the last week of the campaign, Rees and I went to an event in Tupelo. Vice President George Bush flew there to campaign for Jack. We joined the illustrious public figures on the tarmac, standing at the bottom of the wheeled staircase to Air Force Two as Bush came off the plane. Rees has hanging in his chambers a framed picture of the two of us greeting the Vice President at the bottom of those stairs. Not pictured is what happened a few minutes later. Without any invitation being given, I got into my car and moved into position a few vehicles behind the lead cars for the caravan into downtown. The ride was fast, running all the lights and stop signs with police blocking most of the intersections—I was worried about those where they were not. Riding with me, no doubt worried about my lack of training for such things, were Rees and state GOP Chairwoman Ebbie Spivey. They both still remember the ride. Jack lost narrowly to Ray Mabus for governor.

The other campaign in which we worked was that of George H. W. Bush. Bush was Vice President from 1981-1989. By 1985, his campaign to succeed Ronald Reagan was unannounced, but well underway. Rees was the Bush chairman for the Fourth Congressional District, while I worked closely with Rees as chairman of the state steering committee. We attended the 1988 national convention in New Orleans, which was just one example of the many occasions for close interaction.

The Vice President's son, George W. Bush, was frequently in the state for his father. In May 1988, when George was present for the state GOP convention in Jackson, Rees invited him for a run the next morning. He accepted. We met early at the then-Coliseum Ramada, where the previous day's political activities had occurred. The three of us were to run a five-mile course through downtown and the Belhaven neighborhood,

mapped out beforehand by Rees. I was not used to that distance and started to lag with a mile or two left to go. The future President and future judge did not let me fall too far behind before they circled back to make sure I did not need emergency medical attention. I lied by saying all was well and to go on without me.

Another run came after the national convention. Senator Dan Quayle, the vice presidential nominee, came to Jackson for an evening campaign event at the other former Ramada, the Renaissance on County Line Road. Again Rees took the initiative. He suggested to Senator Quayle that since we knew he was a runner, perhaps the next morning he would like to go for a run. Whether he really wanted to go running or not, being agreeable is what candidates need to be. Quayle was agreeable. Senator Cochran signed up too. Early the next morning, with more Secret Service protection than I was used to having while running, we met at the Chastain Junior High School dirt track and spent some quality time going around in 440 yard circles.

Initiating those runs is a great example of why Rhesa H. Barksdale—who is not much older than I—became a Fifth Circuit judge in 1990 and I did not until 2007. Some people seize the day; others sleep late.

Rees and I were practicing law at different firms, but the excitement of working for candidates in whom we believed, brought us much closer together. By the way, we did a fair amount of campaign work and did not merely run with the celebrities. It was with great relief to me that Bush was elected. I went to Washington to join the Administration. To explain Rees's next adventure, I will backtrack four years.

Throughout the Reagan Administration, there were difficulties with nominations for the Circuit Courts. Delays were common. If the American Bar Association informed the Reagan Administration that it would give a negative rating to someone who had been proposed, often the person was not nominated.[2]

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[2] SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM [F. D.] ROOSEVELT THROUGH REAGAN 285-300 (Yale Univ. Press 1997) (discussing the Reagan Administration approach to controversial nominations in his first term, including consideration of Louisiana attorney Ben Toledano in 1982 for the Fifth Circuit).

Rees first became involved in the nomination struggles in 1984 as a result of the creation by Congress of two new seats in July for the Fifth Circuit.[3] Houston attorney Edith Jones was fairly quickly selected for one. She was nominated in September 1984, not confirmed, but then approved after being renominated in February 1985.[4]

The other new seat was sharply contested. On December 6, 1984, Senator Thad Cochran recommended to President Reagan that Mississippi receive the appointment; Rees was his candidate.[5] I had a few weeks earlier sent a letter to Senator Cochran, urging that he recommend Rees to the President: "You know his qualifications as well as I, which include a very keen intelligence, considerable experience in federal court as a trial attorney, and a tremendous willingness to work."[6] The Senator had made Rees his clear choice without needing any advice from me. Thad's persistent support was indispensable to the success that eventually came.

In November 1985, however, it became public that Professor Lino Graglia of the University of Texas Law School had been selected by the Administration for the second seat. He apparently had been chosen months earlier and a confidential background investigation was underway. Graglia's seemingly imminent nomination drew opposition. He had written articles and made statements in his law school classes that were controversial. Graglia defended on the basis that he was trying to be provocative to students and others. A headline in a New Orleans newspaper said that "Choice for Court Appalls Activists," including civil rights leaders.[7]

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[3] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, § 201 (current version at 28 U.S.C. § 44(a) (2006)).

[4] 130 CONG. REC. 25681 (daily ed. Sept. 17, 1984) (nomination of Edith H. Jones); 131 CONG. REC. 3839 (daily ed. Feb. 27, 1985) (nomination of Edith H. Jones); 131 CONG. REC. 7427 (daily ed. Apr. 3, 1985) (confirmation of Edith H. Jones).

[5] Tom Brennan, *Courting the 5th Circuit: Is State in Race?,* CLARION-LEDGER (Jackson, Miss.), Jan. 13, 1986, at 1A.

[6] Letter to Senator Thad Cochran from author (Nov. 27, 1984) (on file with author).

[7] David Snyder, *Choice for Court Appalls Activists*, TIMES-PICAYUNE (New Orleans), Nov. 17, 1985, at 1. Judi Hasson, *Appointments by Reagan Put His Imprint on the Judiciary*, HOUSTON CHRONICLE, Dec. 1, 1985, at Sec. 1, p. 21.

The Circuit Court positions are not by statute assigned to a particular state. Along with all the other controversies that arise with nominations, the battles among senators from different states for seats are recurring. There were published reports that when the two new seats were created by Congress in 1984, there was an agreement that Texas would get one of the vacancies. It had done so with the appointment of Houstonian Edith Jones. Mississippi and Louisiana were to vie for the other one.[8] The selection of Professor Graglia of Texas violated that understanding.

The American Bar Association reportedly interviewed Professor Graglia during the summer of 1985. The ABA notified the Administration that Graglia was not considered qualified due to his temperament. In the fall, the Administration asked the ABA to evaluate him again. The ABA did. Again, the response was that he would receive a low evaluation. A news article in January 1986 stated that six months earlier, "Barksdale's nomination seemed doomed" because of Professor Graglia's selection.[9] Now it was Graglia's selection that was doubtful.

As a way to reach a decision, the Administration contacted Griffin Bell, who had served as a Fifth Circuit judge from 1962–1976. Resigning from the court, he practiced law briefly, then served as Jimmy Carter's Attorney General. Bell agreed to review the ABA's objections. The Bell report was not made public, but someone in the Administration said that Bell "did not give us a reason to go forward" with the nomination.[10] By early August 1986, Graglia was abandoned as a nominee.[11]

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[8] Brennan, *supra* note 5, at A1.

[9] *Id.*; Judy Wiessler, *Choice of UT Prof for Judge Becomes Political Hot Potato*, HOUSTON CHRONICLE, Dec. 22, 1985, at 22.

[10] *UT Prof Dropped From Consideration for Court*, HOUSTON CHRONICLE, Aug. 7, 1986, at 4. The Justice Department requested that Judge Bell and two other attorneys independently prepare reports. Judge Bell asked one of his former law clerks practicing in Austin to interview certain people. An oral summary of the interviews was provided only to Judge Bell. The three reports did not convince the Administration to proceed with the nomination. Donald Baer, *Justice Ordered Three Reports on Graglia*, LEGAL TIMES, Aug. 18, 1986, at 4; telephone conversation between author and Austin attorney John Harmon, November 11, 2009.

[11] Judy Wiessler, *Scrapping Plan for Texan's Judgeship Shows New Caution*, HOUSTON CHRONICLE, Aug. 10, 1986, at 21; Sheldon Goldman, *Reagan's Second Term*

The struggle continued as to which state would receive the nomination. The next choice was New Orleans attorney Haywood H. Hillyer, III, whose political strength was exemplified by the fact that in 1988 he would become his state's Republican National Committeeman.[12] Rees had again been passed over. Hillyer went through the background checks, initial ABA review, and other requirements. Before any nomination was made, though, Democrats regained a majority in the Senate as a result of the November 1986 elections. Hillyer's prospects were nil, and he withdrew his name from consideration.[13] Now a new choice had to be made.

In March of 1987, it was reported that Senator Cochran was "virtually conceding that Rhesa 'Rees' Barksdale of Jackson, his choice to fill a vacancy on the 5th Circuit Court of Appeals, has little hope of securing the seat."[14] Cochran said that it "is pretty well final" that Houston City Attorney Jerry E. Smith, promoted by Texas Senator Phil Gramm, would be named.[15] On June 2, 1987, after at least two others were selected by the Administration, only to be abandoned, Smith was nominated. Senators from both Louisiana and Mississippi opposed him, saying the seat should not go to a Texas nominee.[16] After Smith's nomination, Chief Judge Charles Clark sent a letter to Senator John Stennis, arguing that there were too many Texas judges on the court.[17]

What may have been necessary to break the stalemate was the creation of a new vacancy. One resulted from the sad event of the death of Judge Robert Hill of Dallas on October 19, 1987.

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*Judicial Appointments; The Battle at Midway*, 70 JUDICATURE 324, 327 n.15 (April–May 1987).

[12] ASHER & ASSOCIATES, OFFICIAL REPORT OF THE PROCEEDINGS OF THE THIRTY-FOURTH NATIONAL CONVENTION HELD IN NEW ORLEANS, LOUISIANA 395 (Republican National Committee 1988).

[13] Mark Ballard, *Latest 5th Circuit Vacancy Renews Tri-State Struggle*, TEXAS LAWYER, Dec. 11, 1989, at 1.

[14] Tom Brennan & Joe Atkins, *Texan Has Edge on Barksdale for Judgeship*, CLARION-LEDGER (Jackson, Miss.), Mar. 17, 1987, at 1A.

[15] *Id.*

[16] Joe Atkins, *Cochran, Johnston Fight Texan as Judge*, CLARION-LEDGER (Jackson, Miss.), July 22, 1987, at 1B.

[17] Paul Marcotte, *Too Many Texans on the Court?*, ABA JOURNAL, Jan. 1, 1988, at 30.

Judge Hill and his wife were flying home from a vacation in Kenya when he suffered an asthma attack and died on the plane.[18] Smith's senatorial supporters and opponents now focused on that new vacancy being filled by someone from Louisiana or Mississippi. Smith was confirmed on December 19, 1987.

Senator Cochran pressed vigorously for Rees. Senator J. Bennett Johnston, Jr. of Louisiana was sponsoring a good friend of his. The latter was chosen: Jacques Wiener of Shreveport was nominated for the Hill vacancy by President Reagan on June 27, 1988.[19] He was not confirmed before Reagan left office. He was renominated by President Bush in 1989, and finally confirmed on March 9, 1990. Someone else was also confirmed on that day, as I will mention momentarily.

Rees, after first being recommended by Senator Cochran in December 1984, had watched these various machinations from the sidelines. He had twice gone to Washington to meet with attorneys in the Reagan Justice Department, once in December 1984 and again in April 1986. He had not felt encouraged after either meeting. With the naming of Jacques Wiener, the door for Rees seemed closed.

George Bush's 1988 election greatly improved Rees's chances. Senator Cochran continued to sponsor him, now to a new President. A new vacancy was created when Alvin B. Rubin of Louisiana notified the President on June 19, 1989, that he would take senior status on July 1.[20] He was suffering from liver cancer that would take his life two years later.[21] Rees was immediately under consideration. The Administration agreed to interview him. I had started at the Justice Department about two weeks before Rees was interviewed there on August 17, 1989. I sang Rees's praises to various people involved in the process. My earliest move may have been sending a memo to

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[18] Tracy Everbach, *Appellate Judge's Death Stuns Friends, Colleagues*, DALLAS MORNING NEWS, Oct. 20, 1987, at 15A.

[19] Ballard, *supra* note 12, at 1.

[20] Alvin B. Rubin to the President, June 19, 1989, from Records of the Circuit Executive, U.S. Court of Appeals for the Fifth Circuit, New Orleans.

[21] Joan Cook, *Alvin B. Rubin, 71; Judge Was Known for Rights Rulings*, N.Y. TIMES, June 13, 1991, at D24.

Murray Dickman, a close adviser to Attorney General Dick Thornburgh, two days after I started working at Justice.

The night before his meetings, Rees stayed at the condo in Alexandria that our mutual friend, Pete Perry, and I were renting. I almost certainly would have forgotten something that happened that night had Rees not reminded me of it from time to time. From our visitor's perspective, I had fallen into some uncouth habits. I proved that fact after supper by getting an ice cream carton out of the freezer and eating out of it with a spoon. In my defense, I was just scraping the last of the ice cream out before throwing the carton away. I had to exhibit better table manners the next day, as I was able to arrange lunch for us in the White House Mess.

Rees thought his interviews had gone well. I received that same word from a Justice Department attorney, Barbara Drake, who worked on judicial selection issues. She and the others were greatly impressed by Rees. Expressing his support, George W. Bush sent a hand-written note to his father's White House Counsel, Boyden Gray, saying that Rees "is a very good man—any help would be appreciated."[22]

In early October, I learned from several sources that Rees was all but selected. Drake informed me there were fifteen people interviewed for the vacancy—more than for any other vacancy in the country. She emphasized just how stellar Rees's legal credentials were. His Vietnam service, which earned him a Silver Star for gallantry, and his campaign work for the President surely weighed on his side of the scale too. By the seventeenth of October, the story broke in Jackson that his nomination was imminent.[23]

President Bush called those he nominated for Circuit Court vacancies to express his best wishes. The formal nomination came on Friday, November 17, 1989.[24] The next day, Rees was

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[22] BILL MINUTAGLIO, FIRST SON: GEORGE W. BUSH AND THE BUSH FAMILY DYNASTY 234 (1999) (quoting letter from George W. Bush to C. Boyden Gray (Aug. 14, 1989) (on file with George Bush Presidential Library)).

[23] James Ricketts, *Jackson Lawyer is Apparently in Line for Appellate Judgeship*, CLARION-LEDGER (Jackson, Miss.), Oct. 18, 1989, at 1B.

[24] *Bush Nominates Jackson Lawyer to Fill Vacancy on Court of Appeals*, CLARION-LEDGER (Jackson, Miss.), Nov. 18, 1989, at 3B.

out on a run when a White House operator called his house to give the alert that he should be ready for the call. Rees was found and driven home. President and nominee did not link up for several hours, but the call was worth it.

Rees was not controversial. The American Bar Association rated him "Well-Qualified" for the position,[25] as he certainly was. The two Mississippi senators introduced him to the Senate Judiciary Committee at his hearing on February 27, 1990. Senator Cochran said he had "never known anyone who has had a better mind . . . intelligence . . . a greater degree of integrity and character. . . . He is one of Mississippi's most outstanding lawyers and citizens."[26] The Committee chairman was Senator Joe Biden, but he was not present. Only two members were there to question Rees, Democrat Dennis DeConcini and Republican Strom Thurmond. In the hearing room, Rees told me that any disappointment he might have that only two senators attended was more than offset by the fact the quiet hearing meant his nomination had drawn no opposition. I would later experience how right he was.

After the hearing, Rees's brother Tom hosted a reception at the Monocle, a restaurant on Capitol Hill. Justice and Mrs. Byron White were present, which was a wonderful gesture by the Justice for whom Rees had clerked from 1972 to 1973. Also present were individuals from the White House and Justice Department who had been instrumental in his nomination. Reported out of Committee without dissent on March 8, 1990, Rees was confirmed unanimously the next day, five-plus years since his effort began.[27] At the time, that seemed an impossibly long wait. New colleague Grady Jolly was quoted in a newspaper story on the confirmation: "Rhesa Barksdale is clearly a very bright, very hard-working, ambitious, clear-thinking lawyer,

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[25] STANDING COMM. ON THE FED. JUDICIARY, AM. BAR. ASS'N, RATINGS OF ART. III JUDICIAL NOMINEES, 101ST CONGRESS (1990), *available at* http://www.abanet.org/scfedjud/ratings/ratings101.pdf (last visited Feb. 19, 2010).

[26] Joe Atkins, *Senators Tout Jacksonian for Federal Court*, CLARION-LEDGER (Jackson, Miss.), Feb. 28, 1990, at 1B.

[27] Joe Atkins, *Senate Panel OKs Barksdale as Circuit Judge*, CLARION-LEDGER (Jackson, Miss.), Mar. 9, 1990, at 1A; Joe Atkins & Michael Rejebian, *Senate OKs Barksdale Judgeship*, CLARION-LEDGER (Jackson, Miss.), Mar. 10, 1990, at 1A.

and I think he'll translate those qualities into a fine judge."[28] All that proved valid.

After confirmation, the Senate formally notifies the President of its advice and consent. The President then signs the commission of appointment. The effect of a signed commission's not being delivered to the confirmed nominee was the central legal issue in *Marbury v. Madison*.[29] There was no risk of a refusal to deliver the Barksdale document, but the facts of *Marbury* are an indication of the importance of the actual commission. President Bush signed the commissions of Rees and Jacques Wiener on the same day, March 12, 1990. The date of the commission is the relevant date for determining seniority on the court; when judges have the same commission date, the older one is senior.[30] So Rees has always been junior to the slightly older Wiener.

The new judge's formal investiture was held on June 1, 1990. The event was the public celebration of his appointment; his service on the court had actually begun just days after confirmation. Supreme Court Justice Byron White did the honors of administering the oath a second time. Justice White described Rees as "a good law clerk. He had a good sense of humor and he was fun to work with. . . . He couldn't type well . . .," though, the Justice noted.[31]

I was happy and even proud to have played a small part in the nomination Rees finally received after so many years of waiting. Somewhere in the course of all this, he started to refer to me as his "bobo." He recently reminded me that he adopted the word only after I told him that this was a Louisiana term for a great friend. I have no recollection of where I heard that, but the name was and has remained an honor.

In the years ahead, starting little more than a year after Rees's confirmation, my own long journey to the court began. Rees's support of me in that endeavor began at the same time and never wavered. On July 9, 1991, the marvelous judge for

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[28] Atkins & Rejebian, *supra* note 26, at 1A.

[29] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[30] 28 U.S.C. § 45(b) (2006).

[31] Marky Aden, *Jackson Lawyer Takes U.S. Court Oath*, CLARION-LEDGER (Jackson, Miss.), June 2, 1990, at 1B.

whom I had clerked, Fifth Circuit Chief Judge Charles Clark, announced his retirement effective in January.[32] My first call to Rees about my pursuit of the seat occurred less than a week later. I wrote a note in a ledger of sorts about the call: "7-16-1991. Called Rees, asked about details of his appointment and Louisiana 'claims' [to the Clark seat]. He said I was not only the best candidate, but only one."[33] I loved talking to Rees.

When I interviewed at the Justice Department a few months later, the first questioner was then Deputy Solicitor General, now Chief Justice, John Roberts. He asked me to name three people whom I would like to see on the Supreme Court. With an apology for sounding clumsily ingratiating towards my next interviewer, I listed Solicitor General Ken Starr first. Had I been more insightful, I would have named Roberts. I then added Fifth Circuit Judges Rhesa Barksdale and Patrick Higginbotham to the list. I still believe all three were excellent choices.

The 1991 effort did not work out for me or anyone else, as no one was nominated. George Bush was defeated by Bill Clinton in November 1992. A few years later, Louisianan James Dennis was appointed to the Clark seat. In the following years, Rees remained the perfect friend as I became a serial pursuer of a nomination to the Fifth Circuit. He encouraged, commiserated, and otherwise helped sustain me. When I was finally nominated for the Fifth Circuit on January 9, 2007, I went to the courthouse to tell Rees. I think he was as excited and delighted as I was. He helped keep me emotionally afloat over the eight-plus months of a stormy voyage. The storm began with the gale-force winds I encountered at my Judiciary Committee hearing in May, quite a contrast to Rees's calm hearing in 1990.

Rees's comments in conversation or emails were often just what I needed at the time. When one of the early unexpected delays occurred (before delay became the expectation), Rees wrote that such a failure was "hard to believe. Sad, sad, sad.

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[32] Andy Kanengiser, *Respected Appeals Judge Plans to Retire After 22-Year Stint*, CLARION-LEDGER (Jackson, Miss.), July 10, 1991, at 1B.

[33] Memorandum for file by author (July 16, 1991) (on file with author).

This WILL happen . . . just not as soon as it should have."[34] He closed by saying he was looking "forward to that happy day" when I was confirmed. The elusive destination was reached with confirmation on October 24, 2007.[35]

On the thirtieth of October, Rees swore me in. My wife Sharon stood alongside me, holding a family Bible. Rees's role could not have been more fitting. For several days, I even worked out of his office as some space was made available elsewhere in the courthouse.

About five weeks later, I had my first set of oral arguments as a Fifth Circuit judge. Joyously, I did so as a member of a panel with Rees and Jim Dennis. In the New Orleans courtroom, with my wife in the audience and the advocates ready to start, the three of us walked in and took our places on the bench. Rees was in the center, presiding. Before the arguments began, he welcomed me to the court. He noted Sharon's presence in the courtroom and said excessively complimentary things about me. More than just expressing a colleague's welcome, he was expressing a wonderful friend's, a bobo's, shared joy about my finally being with him on this historic court.

He even wrote Sharon a brief note from the bench and had the bailiff deliver it to her. "So delighted you and Leslie are part of our court family,"[36] he wrote. Rees, Grady, and the other judges have actually made arrival similar to joining a family.

As Rees's nomination struggles reflect, he required perseverance and an emotional balance to remain standing after the first four years of the contest. Once the multi-year political battles among the three states of the Fifth Circuit were resolved, Rees's final victory was gained because his surpassing legal abilities were clearly recognized by those making the selection. A less steadfast and able person would not have made it

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[34] Email from Judge Rhesa Barksdale (Dec. 7, 2006, 5:42 PM) (on file with author). The email was Judge Barksdale's response to my letting him know that the Senate would likely adjourn for the year without voting on any of the thirteen district court nominations, including mine, that had been reported out of the Judiciary Committee and were awaiting a floor vote.

[35] David Stout, *Senate Backs Disputed Judicial Nomination*, N.Y. TIMES, Oct. 25, 2007, at A17.

[36] Note from Judge Rhesa Barksdale to Sharon Southwick (Dec. 5, 2007) (on file with author).

through, and nineteen years later we would not be celebrating the completion of the first phase of his contributions to the court.

In describing briefly his enormous role in my own struggle, I shine light on something else about Rees—his exceptional gift for friendship.

There are so many ways to gain perspective on remarkable people. Their contributions are often so multifaceted that seeing all their qualities requires viewing from many different angles. I have offered my personal angle.

God speed, young friend.

# A PORTRAIT OF THE JUDGE AS A YOUNG MAN

*David E. Kendall**

Judge Barksdale is today a respected, distinguished, dignified, accomplished jurist with a sterling record in private practice and as a judge on the United States Court of Appeals for the Fifth Circuit. His opinions are the subject of scholarly analysis and comment, and his law clerks revere him. This reputation is well-deserved, but its sobriety omits one of the Judge's most salient, if usually concealed, characteristics: his sense of humor.

I first met Rhesa Barksdale in June 1972, as I was preparing to leave my Supreme Court clerkship with Justice White and Rees was preparing to replace me and begin his stint as one of the Justice's three law clerks. I was the first of my trio of October Term 1971 clerks to leave, and I was in a hurry to escape to Europe with my wife on Air Iceland and blow all of the retirement funds that had been deducted from my salary that year.[1] I handed off to Rees some especially long and thorny certiorari petitions (mostly concerning patents) which I had been trying to avoid reviewing and made my escape. He accepted the petitions with grace and good humor.

I reconnected with Rees when I returned in the early fall of 1972, while I was waiting to go into the Army. I had only a vague idea of what Rees himself had done in the Army,[2] although I did know that he was in the same West Point class as another friend of mine, Wes Clark, and was a good friend of

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* Partner, Williams & Connolly LLP in Washington, D.C. B.A., Wabash College; J.D., Yale Law School. The author served as a law clerk to U.S. Supreme Court Justice Byron W. White during 1971-1972, the term preceding Judge Barksdale's clerkship of 1972-1973.

[1] Supreme Court law clerks earned $15,000 a year at that time, which a few years earlier had been the starting salary for young lawyers on Wall Street.

[2] Not until I read David Case's essay for this volume did I realize how truly distinguished Rees's military service had been. Consistent with his personal reticence about his own achievements, he never said a word to indicate the many combat decorations he had won. He would be the last person on the planet ever to appear on a televised "reality" show!

Wes's. I saw Rees a number of times during his clerkship years and thereafter at Justice White law clerk reunions, which occurred during ski season and were often held, quite by chance, in Denver. I also heard a number of stories about Rees from one of his co-clerks, Bob Barnett (my long-time law partner in later years), some true, some merely plausible, but due to my litigation experience with the law of libel pertaining to public figures, I think it better that I not relate those.

Caution thus prevents me from relating many of the incidents having to do with Rees's exploits as a Supreme Court law clerk. For example, I do not intend to say anything about his skill at shooting rubber bands, which won him such fame during October Term 1972. Both Justice White and his law clerks tended to be intensely competitive, whether at work or at play, and one of the games to relieve the tedium of reviewing long, boring certiorari petitions was to shoot rubber bands up into the large glass bowl of the ceiling light fixtures. The Justice would occasionally flip rubber bands with his clerks, and success in the game meant that the room gradually darkened, as the layer of rubber bands began to mask the light from the bulbs. Rees's fame derives, however, not simply from his skill at successfully having his rubber bands land in the bowl, but to the fact that on one memorable day in January 1973, his last rubber band topped the pile, touched the light bulb, caught fire, and caused the pile of rubber bands to begin smoldering and smoking. Court security personnel rushed in to douse the melting mass of India rubber. Happily for his later career, the evidence that Rees's rubber band was the incendiary culprit was consumed in the general conflagration.

Rees was intense, hard working, energetic and smart, but his good humor and sense of humor were unique among Supreme Court law clerks, who tend frequently to be a dour and relentlessly sober lot. Rees was a master deadpan artist of the tall tale, frequently involving a Southern locale and people with unlikely names, packaged in the guise of fact. The twinkle in his eye was the only giveaway. During my Term, one of the more unusual duties of a Justice White law clerk had to do with obscenity cases. At that time, the determination of obscenity was governed by the First Amendment "constitutional fact" doc-

trine,[3] and this meant that the Justices (those who did not believe that the First Amendment barred all obscenity prosecutions) had to view each and every film prosecuted. Screenings of the films were scheduled, and the films were shown in one of the Court's high ceilinged and chandeliered conference rooms, with oil paintings of past Justices soberly staring down from the walls. The antics displayed on these films were anything but sober, however. Justice White often delegated to his law clerks the task of viewing the films and then reporting to him on the films' precise content. Unfortunately, Rees never had the opportunity to make these reports, since during his Term the Court decided *Miller v. California*,[4] ruling that obscenity standards were largely a matter of state not federal law. Sadly, given Rees's narrative talents, his sense of humor, and his abilities to asymptotically approach the outlandish while reporting the factual, the Justice—and Chambers history—was deprived of the truly amazing reports on such films that I am sure he would have written.

Rees also relished the ironies of history, and pointed out to me in the late spring of 1973, when he was guiding me around West Point, that George Armstrong Custer had graduated thirty-fourth in his 1861 class of thirty-four at West Point. In the museum, Rees also showed me Custer's last note, written in pencil on a scrap of paper and sent out of the Little Big Horn: "Come on. Big village. Be quick. Bring packs."

I think everyone who clerked for Justice White was influenced by the Justice's use of the Socratic method. He was a master of asking question after question and by an inductive method coming to a decision about the case before him, which also left him with a good sense of how he could decide other cases not before him. This process extended to Saturday lunches at the Monocle and the Market Inn. I am sure that Rees's own style as a judge was influenced by this relentless verbal pounding and probing. After the Justice retired in 1993, I know that

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[3] *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (appellate court must "examine for [itself] the statements in issue and the circumstances under which they were made" to determine whether the speech is protected by the First Amendment).

[4] 413 U.S. 15 (1973).

he greatly enjoyed sitting with the Fifth Circuit on panels of which Rees was a member. The Justice once remarked at a law clerks reunion banquet that he had delighted in writing a dissent from one of Rees's opinions.

Rees also learned important life lessons from Justice White on another court, what the Supreme Court clerks called the real "highest court in the land," the basketball court which sits immediately atop the Supreme Court's formal and majestic hearing chamber. The roof of the basketball court was low, so outside shooters had to take this into account. The Justice had won twelve varsity letters at the University of Colorado, in football (for which he was most famous), basketball, and track. For a long time, the Justice would play full-court basketball with the decades-younger law clerks and more than hold his own. During Rees's term, he most often played half court, two-on-two with his three law clerks. Guarding the Justice proved to be a memorable if hazardous experience. Driving to the basket, the Justice was wont to push, shoulder, elbow, and shove his way in for a lay-up. After playing defense against the Justice, Rees observed more than once (respectfully, not critically, of course) that he was not certain if the Justice fully appreciated the difference between the rules of football and basketball. But in the final Chambers tournament of twenty-five games, played at the end of October Term 1972, the Justice chose Rees to be on his side, and that team won the contest, playing against the other two clerks, by a margin of 13-12.

Rees's fabulous sense of humor was present at all times, although he was usually careful to keep it under wraps. While Rees wrote a scholarly tribute to Justice White which appeared in the Harvard Law Review after the Justice retired,[5] he also wrote an essay about Justice White for the Justice's children and grandchildren, after the Justice died, as part of a tribute volume, and one of his reminiscences about the Justice says as much about Rees as it does about the Justice. It is far too good to paraphrase. Rees wrote:

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[5] Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3 (1993).

In January 1973, as Richard Nixon's second inaugural approached, I started fantasizing about all of that year's clerks being in the parade. In my junior year at West Point in 1965, I had marched in LBJ's; and, among other things, I had been struck by the fact that, when passing the reviewing stand, because it was on our left, we did "eyes left" instead of the usual "eyes right". So, I had pretty firm and fond memories of it. There were about 30 clerks that year, two of whom were women. Therefore, I imagined they would be our two majorettes, in appropriate attire with batons, with the Chief Justice's chief law clerk as the drum major, with the customary tall, bearskin shako and staff and whistle; the other 27 of us would perhaps march in nine ranks of three. In any event, it would be a good, tight, disciplined formation. The expression on our faces would be stern and haughty, with our mouths in a downturned frown, akin to those of Russian honor guards. I never thought about, much less decided, what we in the rank and file would wear; looking back 30 years, perhaps black suits (not sure we all had one).

As we marched, we would be armed -- with a quill pen, which we would hold with the thumb and forefinger of our right hand at about shoulder height, elbow bent, dipping up and down. And, as we marched we begin the following cadence. On the step-off command, "SUPREME COURT LAW CLERKS, . . . FORWARD . . . MARCH", we would step forward with our left foot and begin, and repeat continuously, the cadence: "The pen is mightier than the sword; . . . the pen is mightier than the sword . . . ." One verse (pen mightier than sword) would take precisely two strides. Therefore, it would begin when our left foot hit on every third step.

As we passed the reviewing stand, containing the President and, I hoped, The Chief Justice, on the command "EYES LEFT", we would shout: "Hail to the chief . . . and hail to you Mr. Chief Justice!" Our eyes would snap back to the front on the command "READY FRONT"; and we would revert to our pen-is-mightier cadence and continue down Pennsylvania Avenue, with a certain swagger and command presence belonging to only the finest and best drilled units.

My co-clerks . . . and I fine-tuned this fantasy, this story. We ironed out every detail (except those rank and file uniforms; looking back, how did we miss that?). Then, along came the

> Justice; I recall vividly that he was standing by the table . . . near the east door at the hall, into the law clerks' office. Because he was such a team-player and loyal colleague to the other Justices, we had never heard him utter a disparaging, much less critical, remark about them. But, I think somehow we knew the Justice was no respecter of pomposity. So, one of us mentioned that we had come up with this idea for a Clerks' Unit in the inaugural parade. And so we began describing it to him; no doubt thinking he would enjoy the tale, but certainly not sure about what his total reaction would be. Soon after the tale began, he started laughing; by the end, he was laughing so hard, he was shaking. I never [saw] him laugh so hard . . . before or since. . . .
>
> That would have been a mighty fine parade.[6]

Now that Judge Barksdale has many law clerks of his own, is it too much to hope that at the next Inauguration, representing the Fifth Circuit and marching smartly in close order drill, will be the Barksdale clerks, shouting "Hail to the Chief . . . and hail to you Judge Barksdale" as they pass the reviewing stand?

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[6] Rhesa Barksdale, *Recollections by Rhesa Hawkins (Rees) Barksdale*, at 2-4 (2002) (proper nouns, printed in all caps in the original document, have been changed to title-case type to enhance readability) (on file with the Mississippi Law Journal).

# SOME THEMES FROM JUDGE RHESA H. BARKSDALE'S PUBLISHED OPINIONS

*Christopher R. Green*[*]

It is a great honor to have served the Judge as a law clerk and now to serve his law-school alma mater as a professor. It perhaps testifies to my own unnatural taste for academic pursuits that I could think of no better way to express admiration and thanks to the Judge for his work on the Fifth Circuit than to read and review as many of his published opinions as I could. As he takes senior status, his energy in contributing to the continuing work of the Fifth Circuit will certainly be greatly missed both by the bar and by his colleagues on the court. His contribution to the law is, however, a permanent legacy that his (semi-) retirement cannot erase or diminish. A full exposition of Judge Barksdale's over 350 additions to F.2d and F.3d in his over 19 years on the Fifth Circuit is, alas, quite impossible. As large as this legacy is, a review merely of the Judge's authored opinions neglects important elements of his Fifth Circuit work, particularly his work in collaborating in other judges' opinions and in resolving a great many disputes through unpublished opinions. His opinions are, however, his main public contribution to the growth of the law, and so a fitting place to focus.

Judge Barksdale has not articulated a judicial philosophy in so many words. His approach to judging is displayed less in explicit theorizing or philosophizing than in the patterns that emerge out of the myriad issues and cases with which he has dealt, carefully and methodically, in his time on the Fifth Circuit. While Professor Lund has addressed several themes related to the importance of lawyers to the Judge's approach to his work, I will cover his concern for the use and abuse of the court system, his largely-textualist approach to interpretation, and his approach to constitutional issues.

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[*] Assistant Professor of Law, University of Mississippi School of Law. A.B., Princeton University; J.D., Yale Law School; Ph.D., University of Notre Dame; law clerk to Judge Barksdale, 1998-1999.

## I. THE USE AND ABUSE OF COURTS

Judge Barksdale is a firm believer that the law, like the Rules of Civil Procedure, should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[1] Judge Barksdale has a clear antipathy to litigants playing games with courts, particularly by changing their story in the middle of litigation, or between trial and appeal. Even absent actual ill will by litigants and lawyers in particular cases, he has always displayed particular sensitivity to the possibility that certain rules may *foster* gamesmanship. I will consider plain error, bankruptcy fraud, the diligent pursuit of habeas claims, and his attitude toward excessive litigation.

### *A. Plain Error*

Appellate judges are not, Judge Barksdale stressed to us on the first day of our clerkship, "knights-errant," searching for error to correct.[2] Absent exceptional circumstances, only issues presented to the district court and to the Fifth Circuit may be considered.[3] Working for the judge, I saw the importance and

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[1] FED. R. CIV. P. 1. The Judge has quoted these words (or earlier versions of them) many times. *See, e.g.*, Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 502 (5th Cir. 2007) (en banc) (Barksdale, J., dissenting); Bazan ex rel. Bazan v. Hidalgo County, 246 F.3d 481, 488 (5th Cir. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1423 (5th Cir. 1996) (en banc); Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993); Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 518 n.10 (5th Cir. 1993).

[2] The Judge quoted BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) ("The judge . . . is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."); *see* Unites States v. Brace, 145 F.3d 247, 256 (5th Cir. 1998) (en banc) (applying Cardozo's dictum to plain error standard).

[3] One early factor possibly contributing to the Judge's vigilance about plain-error standards of review may have been the en banc review of his opinion in United States v. Vontsteen, 910 F.2d 187 (5th Cir. 1990), *aff'd*, 950 F.2d 1086 (5th Cir. 1992), rejecting a vindictive-resentencing-on-remand claim. The Judge noted that the government had not suggested the applicability of plain-error standard until oral argument, and so the Judge considered the issue under the ordinary standard, *id.* at 194 n.5, but when the case was reheard en banc, the Court relied heavily on the plain-error standard, stressing that even if the government fails to point out the plain-error standard, such a forfeiture of the forfeiture issue should not control the Court. *See* United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc, per Davis, J.) ("[N]o party has the power to *control* our standard of review," citing cases from other circuits). Of course, because the

function of the plain-error standard very early in my clerkship, because in looking at a new case, I soon leaned to read the district court's treatment of an issue first, before reading the parties' differing spins on the issue. Of course, issues not raised at the trial court will not *have* such an opinion, and the appellate court's job is obviously much harder where it is starting from scratch. Conservation of appellate resources and the very function of allowing both trial-court and appellate scrutiny require a rule like plain error.[4] As the Judge put it in his 1996 dissent in *Ho*, a case involving whether seeing a plain plastic card provided Fourth-Amendment probable cause, "[W]e do not require, nor can we expect, district judges to be mindreaders, or to conjure issues that might, or should, have been raised."[5] He elaborated:

> This new issue should have been resolved initially in the district court, where evidence is presented and tested, instead of here, where the majority has to base its holding, in part, on its own experience with the use of plastic cards. As oft stated, this is no way to run a railroad; nor is it any way to run our judicial system. In short, the newly raised issue should be reviewable only for plain error.[6]

The Judge briefly explained the purposes of the plain-error standard in *Moody* in 1991:

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defendant did not prevail before Judge Barksdale's panel even under the ordinary standard, the panel's decision about plain error was not outcome-determinative. When the case was reheard en banc, however, some of the judges in the majority might have felt the case close enough that the change in standard of review made a difference. Four judges dissented from the en banc decision. *Id.* at 1093-95 (Clark, C.J., joined by Politz, King, and Jolly, JJ.).

[4] The Judge's concern for multiple independent analyses of an issue extends to the procedures he follows for oral argument. Rather than relying on a single clerk's bench memo circulated to all three judges on the panel, he has insisted on his clerks writing summaries of all of the cases to be heard at oral argument, lest the three judges find themselves "singing from the same song sheet," as he explained it on our first day. While the Judge would surely be loath to put it in such esoteric terms, his intuition about the value of independent review is reflected in the Condorcet Jury Theorem, which shows in mathematical terms how a group's decisions can under certain conditions be more reliable than any of the individuals composing it. Individuals' decisions must, however, be independent. *See, e.g.*, CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS 8-9 (2009).

[5] United States v. Ho, 94 F.3d 932, 940 (5th Cir. 1996) (Barksdale, J., dissenting).

[6] *Id.* at 938-39. "No way to run a railroad" is a common Barksdalism, though this is apparently the only time it made its way into an opinion.

> The salutary purposes for the plain error standard, especially in the context of failing to contemporaneously object to a proposed jury instruction—and most especially for areas of the law (bankruptcy and trusts) and a trial as technical and precise as are involved here, are obvious. Accordingly, there must be more than error; there must be plain error—a justifiably higher, and more demanding, standard.[7]

In *Maldonado* in 1995, in response to the government failing to point out the plain-error issue, the Judge admonished:

> It is imperative that parties to an appeal be vigilant in ensuring that we are advised whether an issue is being presented for the first time on appeal. Although we review the record for that purpose, this review, obviously, occurs only after the briefs have been filed. Needless to say, the briefs should cover this point, not only because we want the benefit of the parties' review of the record (in that they tried the case, they should know it best), views, research, and opinions on this point, but also because this point drives numerous factors critical to appellate review, including the standard of review and questions asked at oral argument.[8]

Several of the Judge's opinions have helped clarify exactly what plain error is and when the standard applies. The Supreme Court clarified the basic doctrine in *Olano* in 1993: (1) error, that is (2) plain, (3) prejudicial, and (4) in the discretion of the reviewing court, "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[9] Judge Barksdale has worked diligently both to apply *Olano* and to consider carefully other issues related to plain error doctrine.

*Rodriguez* in 1994 noted that one early short form of the plain-error standard, referring only to purely-legal issues whose resolution would prevent manifest injustice, was inconsistent with *Olano*; review under such a standard would both be too narrow (suggesting that determinations of fact could never constitute plain error) and too broad (suggesting that manifest in-

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[7] United States v. Moody, 923 F.2d 341, 348 (5th Cir. 1991).

[8] United States v. Maldonado, 42 F.3d 912 n.9 (5th Cir. 1995).

[9] United States v. Olano, 507 U.S. 725, 732 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

justice is the only consideration for purely-legal questions).[10] Later in 1994, *Calverley*, now the Fifth Circuit's leading case on the plain-error standard, credited *Rodriguez* with "foreshadow[ing] today's decision."[11] The same two basic issues—the law/fact distinction and the "manifest justice" formulation—were involved in the Judge's 1995 panel and 1996 en banc opinions in *Douglass*. His panel opinion noted that circuit precedent allowed de novo review at the Fifth Circuit of legal issues not brought to the attention of the district court after a proceeding before a magistrate judge; only factual issues were subject to the plain-error rule.[12] On en banc review, the Judge made clear that factual and legal issues are held to the same standard,[13] also making clear that "manifest injustice," which had appeared in many opinions as a separate basis for reversal, was not a separate inquiry from the plain-error standard.[14]

*Martinez* in 2002 considered in some detail whether to consider a new claim on appeal based on intervening Supreme Court precedent.[15] The Judge found "no sound reason to depart now from our long established course of refusing, absent extraordinary circumstances, to entertain legal issues raised for the first time on appeal,"[16] noting that in *Martinez* itself the law was "not so settled prior to [the recent Supreme Court case] that raising her . . . claim in district court would have been pointless or futile."[17]

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[10] United States v. Rodriguez, 15 F.3d 408, 416 n.10 (5th Cir. 1994).

[11] United States v. Calverley, 37 F.3d 160, 163 (5th Cir. 1994) (en banc).

[12] Douglass v. United Servs. Auto. Ass'n, 65 F.3d 452, 456-58 (5th Cir. 1995).

[13] Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1421-23 (5th Cir. 1996) (en banc).

[14] *Id.* at 1423-28. Just as the Judge was concerned to avoid the sand-bagging incentives posed by issues first raised on appeal, he was concerned about unfair surprise to the litigants caused by the Fifth Circuit's own change of course. Accordingly, he applied his new rule only prospectively, to litigants who had been specifically warned of the consequences of a failure to make objections to the district court. *Id.* at 1429.

[15] Martinez v. Tex. Dep't of Criminal Justice, 300 F.3d 567, 573-75 (5th Cir. 2002).

[16] *Id.* at 574.

[17] *Id.* at 574-75. Several of Judge Barksdale's other opinions reflect a similar sensitivity to the fact that the law changes, but litigants cannot be expected to anticipate future changes in the law. The Judge has never been unduly swayed by the common-law fiction that courts declare the law as it has always been. Courts therefore struggle not only to clarify the present state of the law, but must in several contexts assess the reasonableness of an action in light of the prior state of the law.

The Judge's en banc opinion in *Brace* in 1998 illustrated the fact that issues must be raised to the district court (and on appeal) in adequate detail, distinguishing a defendant's generic entrapment claim that he was not predisposed to commit a crime from the claim to lack "positional predisposition" (i.e., *ability*, as opposed to mere willingness, to commit a crime had the government not acted). Accordingly, plain-error forfeiture and failure-to-brief waiver applied to this second issue, even though the generic predisposition issue had been raised below and briefed to the Fifth Circuit.[18]

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Several of his opinions discuss in depth the *Teague* non-retroactivity doctrine for habeas cases, according to which (subject to two frequently-litigated exceptions) a federal court may only release a prisoner if a result is "dictated by precedent" when a conviction becomes final. *See* Davis v. Scott, 51 F.3d 457, 466-67 (5th Cir. 1995); United States v. Shunk, 113 F.3d 31, 35-37 (5th Cir. 1997); Burdine v. Johnson, 231 F.3d 950, 953-58 (5th Cir. 2000); Henderson v. Quarterman, 460 F.3d 654, 663-64 (5th Cir. 2006); *In re* Smith, 142 F.3d 832, 835-36 (5th Cir. 1998) (considering retroactivity-related limits on successive habeas petitions in AEDPA).

In qualified immunity cases, he has stressed the fact that law must be clearly established at the time of an injury, not merely at the time of an appeal, in order to overcome qualified immunity. *See* Dunn v. Denk, 79 F.3d 401, 404 (5th Cir. 1996) (en banc) (Barksdale, J., dissenting in part) (stressing the time at which qualified immunity was to be assessed, i.e., between Johnson v. Morel, 876 F.3d 477 (5th Cir. 1989) (en banc), and Hudson v. McMillan, 503 U.S. 1 (1992)); Dunn v. Denk, 54 F.3d 248, 253-56 (5th Cir. 1995) (Barksdale, J., dissenting) (same); Foster v. City of Lake Jackson, 28 F.3d 425, 428-29 (5th Cir. 1994) (key for qualified immunity is "pre-existing law"); Kiser v. Garrett, 67 F.3d 1166, 1171-73 (5th Cir. 1995); Hare v. City of Corinth, 135 F.3d 320, 326 (5th Cir. 1998) (italicizing "clearly established at the time of the incident" and "as it existed" in qualified-immunity standard); Spann v. Rainer, 987 F.2d 1110, 1115-16 (5th Cir. 1993) (denying qualified immunity because law on excessive force was sufficiently precise at the time of injury); Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 620 n.5 (5th Cir. 1992) (key is "the law as it existed at the time of the conduct in question"); Kinney v. Weaver, 301 F.3d 253, 287 (5th Cir. 2002) (Barksdale, J., dissenting) (italicizing "several years ago" in the qualified-immunity standard); *id.* at 291 (italicizing "existing" law in qualified-immunity standard).)

Finally, he has addressed when intervening authority would support a remand for more evidence, as opposed to applying new law to an old record. *See* Deffenbaugh-Williams v. Wal-Mart, 188 F.3d 278, 282 (5th Cir. 1999) (reconsidering earlier opinion in light of Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999)) ("When law changes in unanticipated ways during an appeal . . . this court will generally remand for a new trial to give parties the benefit of the new law and the opportunity to present evidence relevant to that new standard. The motivation of this rule is fairness: to prevent injustice to a party who had no reason to expect a changed rule at the time of trial."); Hill v. Int'l Paper Co., 121 F.3d 168, 173, 177 (5th Cir. 1997) ("dramatic change in Mississippi premises liability law" requires remand "in fairness to the court and the parties . . . .").

[18] United States v. Brace, 145 F.3d 247, 255-61 (5th Cir. 1998) (en banc). The Judge has enforced inadequate-briefing waiver per FED. R. APP. P. 28(a)(9)(A) ("the argument . . . must contain . . . [a party]'s contentions and reasons for them, with citations to the

The Judge's concern for plain-error doctrine has not merely served as a device for affirming more district-court judgments. The Judge has showed concern with the proper articulation of the plain-error standard of review even in cases where he would find the stricter standard satisfied, or in cases in that would be affirmed even under the more lenient normal standard.[19] Despite his preference for brevity, he has also demonstrated his willingness to engage the proper-preservation issue at length.[20] Also, the Judge has not uniformly urged a narrower approach to plain error, but has sometimes argued in favor of broadening it.

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authorities and parts of the record on which the [party] relies") many times. *See, e.g.*, United States v. Abroms, 947 F.2d 1241, 1250 (5th Cir. 1991); Ceres Gulf v. Cooper, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992); United States v. Kleinebreil, 966 F.2d 945, 948 n.6 (5th Cir. 1992); Thomas v. N.A. Chase Manhattan Bank, 994 F.2d 236, 242 (5th Cir. 1993); Shushany v. Allwaste, Inc., 992 F.2d 517, 520 n.5 (5th Cir. 1993); United States v. Miles, 10 F.3d 1135, 1138 (5th Cir. 1993); Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1490 (5th Cir. 1995); Peavy v. WFAA-TV, Inc., 221 F.3d 158, 172, 176, 179 (5th Cir. 2000); Martinez v. Mukasey, 519 F.3d 532, 545-46 (5th Cir. 2008).

[19] *See, e.g.*, United States v. Campbell, 49 F.3d 1079, 1086 (5th Cir. 1995) (Barksdale, J., concurring) ("[I]t is most arguable that we should review the motion for acquittal/element of the offense issue only for plain error, because [the defendant] did not later object to the jury instruction on this point"); United States v. Johnson, 267 F.3d 376, 381 (5th Cir. 2001) (Barksdale, J., specially concurring) ("I cannot agree with the *ratio decidiendi*, especially the conclusion that the issue was adequately raised (preserved) in district court. It goes without saying that [the defendant's] counsel should have stated far more clearly his position (objection) concerning not being allowed to confer with his client during the two lengthy recesses. On the other hand, even reviewing the issue in the light most deferential to the Government . . . I would still reverse [the defendant's] conviction because, on this record, there was an obvious error that affected his substantial rights (Sixth Amendment right to counsel) and the fairness of this proceeding and, as a result, it is within our discretion to correct this error.").

[20] *See* United States v. Ho, 94 F.3d 932, 940 (5th Cir. 1996) (Barksdale, J. dissenting) ("numbing, but nonetheless necessary, detail"); United States v. Maldonado, 42 F.3d 906, 909 (5th Cir. 1995) ("necessary, considerable (and perhaps numbing) detail").

For other apologies for opinion length, see *Johnson v. Sawyer*, 120 F.3d 1307, 1338 (5th Cir. 1997) ("It is past time for this opinion to end."), and his not-so-concise opinion in *Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1464 (5th Cir. 1993) ("Both sides appeal, raising almost countless issues."). The Judge often expressed his sometimes-unfulfilled preference for brevity with a line he attributed to Churchill: "If I had more time, I would have written a shorter letter." The same or a similar line has been attributed to Blaise Pascal, Mark Twain, T.S. Eliot, Cicero, and others. For a collection, see http://dangerousintersection.org/2006/04/12/more-time-shorter-letter/. *Johnson* was the Judge's third-longest opinion, covering 32 pages of F.3d; his two longest were his 2001 en banc dissent in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (45 pages of F.3d) and *Peavy v. WFAA-TV*, Inc., 221 F.3d 158 (5th Cir. 2000) (37 pages of F.3d).

For instance, in *Graves* in 1993, he criticized the rule that a litigant must sometimes raise evidentiary issues twice to the trial court, first in making or opposing a motion in limine and second when evidence is introduced at trial. "Although it may seem redundant—as well as contrary to the underlying reasons for motions in limine—to require [a litigant] to object at trial after having unsuccessfully opposed the motion in limine, we are bound by a recent decision by this circuit that plainly requires [the litigant] to lodge a contemporaneous objection in order to preserve the issue for appeal."[21] The Judge's resistance to superfluity at the district court was later vindicated in modifications to Evidence Rule 103.[22]

Even where plain-error doctrine has not applied, the Judge has expressed displeasure when issues are raised for the first time on appeal. In considering an unforfeitable, unwaivable issue of subject matter jurisdiction, the Judge noted in *Muhammad* in 1999, a case concerning involuntary psychiatric commitment:

> This notwithstanding [i.e., notwithstanding that the subject-matter-jurisdiction issue was non-waivable and non-forfeitable], we are troubled greatly by counsel filing the consent [to magistrate-judge jurisdiction], then participating in the commitment proceeding without any objection or notice that the magistrate judge lacked jurisdiction, and then making the claim, albeit one of jurisdiction, for the first time on appeal.
>
> In short, this issue should have been presented in district court for a host of obvious reasons; these include ensuring that Muhamad received the most expeditious treatment (should she be found in need of same), and judicial efficiency and economy. While we do not question counsel's good faith in presenting the

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[21] United States v. Graves, 5 F.3d 1546, 1551 (5th Cir. 1993). The Judge did not urge en banc review because the difference in standard of review was probably not outcome-determinative (i.e., even under normal standards, *Graves* presented no reversible error), but recommended en banc reconsideration of the issue "in the appropriate case." *Id.* at 1553. Evidence Rule 103 was amended before such a case arose. *See infra* note 22.

[22] *See* FED. R. EVID. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.") (adopted in 2000).

> issue at this late date, we caution/note the obvious: this is no way to proceed. This issue should have been raised when this proceeding began approximately nine months ago.[23]

### *B. Bankruptcy Abuse*

The Judge's concern with plain error relates to litigants who at one point (i.e., before the trial court) fail to raise an issue, but then later (i.e., before the Fifth Circuit) claim that the issue is important. In *Coastal Plains* in 1999, Judge Barksdale addressed a structurally-similar problem in bankruptcy: the debtor who initially fails to list an asset or claim and then later seeks to enforce it. He considered the requirements for judicial estoppel, which prevents litigants from "playing fast and loose with the courts" by changing their position mid-stream,[24] holding that judicial estoppel has no affirmative bad-faith requirement for bankruptcy cases, and that "inadvertence" is only an exception where the debtor lacks either knowledge of a claim or motive for concealing it.[25] A similar case, *Baudoin* in 1993, holding that a claim that could have been raised before the bankruptcy court could not be raised later, featured a short ode to the finality promoted by res judicata, especially in the bankruptcy context:

> [T]he numerous and substantial reasons for the doctrine of *res judicata* are too well known, and obvious, to bear repeating. And, they are all the more compelling today, especially for bankruptcy, and related, proceedings. Because of spiraling litigation costs, increasingly congested courts—especially bankruptcy courts—and expanding theories of recovery . . ., it is more imperative than ever that the doctrine of *res judicata* be applied with unceasing vigilance.[26]

Several of the Judge's opinions consider other abuses of the bankruptcy process. The Judge's 2000 panel dissent and 2001 en banc majority opinion in *Mercer* concerned the application of

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[23] United States v. Muhammad, 165 F.3d 327, 330 (5th Cir. 1999).

[24] *In re* Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir.1988)).

[25] *Id.* at 210-13.

[26] *In re* Baudoin, 981 F.2d 736, 740 (5th Cir. 1993).

the non-dischargeability-for-fraud rule of 11 U.S.C. § 523(a)(2)(A), holding that the use of a credit card is a representation of the intention to repay on which the credit card issuer might justifiably rely, even if the card was pre-approved and used primarily for gambling.[27] The purpose of bankruptcy, the Judge wrote, is to allow *honest* debtors a "fresh start," but not fraudfeasors:

> [T]he principle that exceptions to discharge are narrowly construed . . . seeks to further the goal of providing the debtor a "fresh start" . . . . By enacting § 523(a)(2)(A), Congress made clear its intent to limit the "fresh start" to honest, but unfortunate, debtors, *not* perpetrators of fraud.[28]

*Grothues* in 2000 held that a tax-evasion plea-bargain promise to pay one's taxes may not be avoided through bankruptcy, even for taxes that were not the precise subject of the earlier prosecution: "[H]olding otherwise might—indeed, probably would—encourage unscrupulous debtors to use bankruptcy law as a shield against enforcement of criminal proceedings promises they had no intention of keeping, but nevertheless made, in order to gain a more favorable plea agreement/sentence."[29]

### *C.* Burdine *and Withheld Evidence*

Judge Barksdale's 2000 panel opinion and 2001 en banc dissent in *Burdine*, the "sleeping lawyer" case, are, unfortunately, the only places that many people in the wider public have encountered him.[30] At issue was a narrow issue regarding the ap-

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[27] *In re* Mercer, 211 F.3d 214, 222 (5th Cir. 2000) (Barksdale, J., dissenting), *rev'd*, 246 F.3d 391 (5th Cir. 2001) (en banc).

[28] *In re* Mercer, 246 F.3d at 407 n.17.

[29] *In re* Grothues, 226 F.3d 334, 339 (5th Cir. 2000).

[30] Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000), *rev'd*, 262 F.3d 336, 357 (5th Cir. 2001) (en banc) (Barksdale, J., dissenting). For some of the popular-press mischaracterization of the case, see Clarence Page, *Of Sleeping Lawyers and a Death Sentence*, OCALA STAR-BANNER, Nov. 2, 2000, at 8B (characterizing the panel opinion: "If you nod off into a peaceful little slumber during the proceedings, no problem."). Even in law reviews, the opinion has been characterized as approving the lawyer's performance, which it did not. *E.g.*, Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 493 n.67 (2009) (characterizing the Court as "condon-

plication of Sixth Amendment ineffective-assistance-of-counsel rules to a state of uncertainty: when a lawyer has misbehaved egregiously during trial, but, because of the passage of time, it is not clear exactly *when* that misbehavior occurred, so that its effect can be assessed, is a criminal defendant required to show an actual prejudicial effect on his trial, or should a presumption of prejudice apply? In 1984 in *Cronic*, the Supreme Court held that the absence of counsel would be presumed prejudicial only if it occurred during a "critical stage."[31] In *Burdine*, the en banc majority, echoing Judge Benavides's panel dissent, declined to hold that *any* portion of the trial counts as a critical stage, but instead held that, in the face of uncertainty, "repeated unconsciousness of [the defendant]'s counsel through not insubstantial portions of . . . [the defendant]'s capital murder trial warrants a presumption of prejudice. . . ."[32] Judge Barksdale held that any such "not insubstantial" presumption-of-prejudice rule would count as new under the non-retroactivity rule of *Teague*, and that such a presumption was inappropriate if the time at which the attorney misbehaved could not be identified.[33]

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ing the 'assistance' of a lawyer who slept during a trial"); Rodney J. Uphoff, *On Misjudging and its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 544 n.134 (2007) (characterizing the Court as "finding lawyer who admitted sleeping through substantial portion of a capital murder trial effective"). Judge Barksdale plainly called Joe Cannon's actions "deplorable" and expressed "abhorrence at the spectacle." *Burdine*, 262 F.3d at 357, 358 (Barksdale, J., dissenting). Oddly, in addition to mischaracterizing the Judge's position, both Bernstein and Uphoff cite only the en banc decision, which applied a presumption of prejudice to *uphold* habeas relief, over Judge Barksdale and four other judges' dissent.

[31] United States v. Cronic, 466 U.S. 648, 659 (1984).

[32] Burdine, 262 F.3d at 349. Some commentators have, like Judge Barksdale, found the majority's formulation unclear. *See, e.g.*, James M. Donovan, Burdine v. Johnson—*To Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising From Sleeping Counsel*, 47 LOY. L. REV. 1585, 1603 (2001) (in combining tests from Javor v. United States, 724 F.2d 831 (9th Cir. 1984), and Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996), the en banc court "leaves the issue of the applicable test at least as unresolved as it was when it took up the case, and perhaps it is left even murkier than when it began"); Donovan, *supra* note 32, at 1387 (en banc court "intertwined the *Javor* and *Tippins* tests, rendering unclear which test the Fifth Circuit has adopted"); Kristina G. Van Arsdel, Burdine v. Johnson*: The Fifth Circuit Wakes Up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest,* 39 HOUS. L. REV. 835, 860 (2002) (agreeing with dissent that "any number of definitions can be assigned to the majority's 'not insubstantial' standard" and complaining that "the standard needs to be more specific").

[33] *Burdine*, 231 F.3d at 958. Judge Barksdale's resistance to presumptive prejudice has also won favor with some later courts. *See, e.g.*, *The Last Word: Habeas Relief for*

Judge Barksdale's panel opinion noted the potential for abuse engendered by the defendant's long delay in making his claim:

> [W]e are troubled, to say the least, by wide-ranging abuses that can result where, as here, a criminal defendant sits next to counsel during trial; makes *no* mention then of counsel sleeping during trial; requests that the same counsel represent him on direct appeal; and then, over ten years after trial, claims ineffective assistance because counsel slept during trial, despite defendant never, by affidavit or testimony, stating under oath that counsel engaged in such conduct.[34]

As with plain error or bankruptcy, the Judge was loath to adopt a rule under which a litigant would benefit from uncertainty fostered by his own lack of diligence. The Judge's concern about rewarding a litigant's own creation of uncertainty was greatly compounded, however, when Burdine's lawyer publicly attacked the Judge's panel opinion on the ground that Burdine "kept trying to nudge his attorney awake."[35]

Not only had Burdine failed to make his claim in a way that would have helped resolve the relevant uncertainty, but he had withheld evidence of his own activity during trial, permitting, as the Judge saw it, the negative inference that such evidence would have been unhelpful to Burdine's critical-stage *Cronic* claim.[36] The Judge viewed the late, extrajudicial presentation of evidence as an attack on "the integrity of our court and this proceeding."[37]

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*Client of Sleeping Lawyer, but It Took a Long Time—and Not Every Court Agrees*, 8 CRIMINAL PRACTICE GUIDE no. 4, July/August 2007, at 26 ("In the post-Florida v. Nixon era 543 U.S. 175 (2004)) [sic], courts have avoided *Cronic's* deprivation-of-counsel stance and they have not followed the Fifth Circuit's lead [in *Burdine*]; rather, many courts require proof of when and how much of the trial counsel allegedly slept through and demand concrete proof of prejudice.") (citing Vargas v. Pliler, 2006 WL 2067079 (E.D. Cal. Jul 24, 2006), report and recommendation adopted, 2006 WL 2781640 (E.D. Cal. Sep 23, 2006); State v. Rosado, No. 83694, 2005 WL 3436358 (Ohio App. 8 Dist. Dec. 15, 2005)).

[34] *Burdine*, 231 F.3d at 957.

[35] *Id.* at 365 n.7 (Barksdale, J., dissenting).

[36] *Id.* at 365-67 (Barksdale, J., dissenting).

[37] *Id.* at 366.

While the Judge's opinions in *Burdine* have been presented as the worst sort of toleration for breaches in judicial procedure,[38] the Judge's approach to the case actually reflects in important ways the same concern for the orderly, consistent, diligent presentation of claims that the Judge has repeatedly displayed in other cases. Judge Barksdale has insisted in a great variety of contexts that only claims brought to the attention of the court at all proper levels of review, and at the proper time, can be assessed fully and fairly by the courts. However unappealing it might be to seem to approve egregious errors when corrections are sought belatedly, and however tempting it might be to excuse delay where a late claim is particularly incendiary, as in *Burdine*, the Judge has always adhered strictly to his sense of the demands of protocol.

### *D. Civil Litigation and Summary Judgment*

The Judge has been a big fan of the proper use of summary judgment to resolve litigation where there is no genuine dispute of material of fact, viewing it as a critical response to abusive litigation. He wrote in 1993's *Calpetco 1981*, allowing a district court to refuse to reopen a summary judgment in light of new affidavits,

> [S]ummary judgment . . . has an important, and ever increasing, role in stemming the tide of explosive litigation, greatly congested dockets, increasing delay in claims being adjudicated, and spiraling—indeed, unimaginable—litigation costs. In short, it is one of the primary weapons in the Federal Rules of Civil Procedure arsenal . . . . Summary judgment, pursuant to the simple procedures established by Rule 56, serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely. Where, as here, partial summary judgment is granted, the length and complexity of trial on the remaining issues are lessened, all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general. These are interests of great import, and if they are to be served, the Rules designed to sponsor and secure them must be followed and enforced. In short, a district

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[38] *See supra* note 30.

> judge must have considerable discretion in determining when enough is enough.[39]

The Judge's concern for frivolous litigation was most memorably displayed in *Dawson*,[40] a 1995 opinion reversing sanctions against an Assistant U.S. Attorney for failing to make a settlement offer related to a prisoner who ran into a pole during a softball game. Judge Barksdale likened frivolous-litigation settlements to ransom payments. He noted, "In light of the increasing flood of prisoner litigation that threatens to submerge our courts, such a factor [encouraging other frivolous lawsuits] is extremely relevant, especially when the Government is the defendant and the taxpayers will be footing the bill for any settlement."[41] He then added a footnote:

> This brings to mind one of the principles learned early and painfully by our Nation (and it is hoped still taught early to schoolchildren), and enunciated in stirring fashion by Robert Goodloe Harper's toast at a banquet for John Marshall in 1798: "Millions for defense, but not one cent for tribute". The toast was attributed to Charles Cotesworth Pinckney, our minister in 1797 to the French Republic, who, when told that American commissioners in Paris to protest French attacks on United States shipping would be received only if they paid a $50,000 bribe and loaned a large amount of money to France, replied, "Not a sixpence, sir". JOHN BARTLETT, FAMILIAR QUOTATIONS 367 (Justin Kaplan, 16th ed. 1992).
>
> Because of such bullying by the British, and especially the French ("Quasi War"), Congress in 1797 authorized resumption of the construction of six frigates, including the famous, and much beloved, USS Constitution ("Old Ironsides"). (The ships' construction had been authorized originally in order to fight the Barbary pirates, who likewise sought to extort money from the infant United States.) THOMAS P. HORGAN, OLD IRONSIDES 12, 14, 24 (1963). In light of the matter before us, it is somewhat ironic that this proud ship, built at considerable expense as an alternative to monetary appeasement, bears the

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[39] Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993).
[40] Dawson v. United States, 68 F.3d 886 (5th Cir. 1995).
[41] *Id.* at 898.

name of the document which trumpets fundamental fairness for all, *even* Assistant United States Attorneys.[42]

## II. INTERPRETATION

Judge Barksdale has not been given to extended theoretical examinations of proper methods of interpretation. Nevertheless, a review of his opinions reveals his steady focus on the statutory text. Again and again, his statutory-interpretation opinions begin and end there. While some of these opinions might not count as "greatest hits," the quick, efficient way in which they generally dispose of disputes on the basis of statutory or other text reveals a great deal about his approach to judging.[43] I will consider several examples where the Judge makes clear that statutory text ordinarily trumps policy, refuses to make the inquiry any more complicated than a straightforward statutory text, pays attention to the details—even very small details—of statutory language, resists the broad use of technical definitions contrary to ordinary usage, and applies textualism to contracts law. Finally, I mention the Judge's prominent non-textualist use of the absurdity canon in his panel and en banc dissents in *Kinney*.

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[42] *Id.* at 898 n.21.

[43] Occasionally, the Judge will indicate that he could have stopped with the statutory text, but go on to examine legislative history or other material. *See, e.g.*, Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 462 (5th Cir. 1994) ("We could stop here, because '[i]ndisputably, the goal of statutory construction is to ascertain legislative intent through the plain language of the statute—without looking to legislative history or other extraneous sources.' But, when interpreting a statute as complex as the Wiretap Act, which is famous (if not infamous) for its lack of clarity, we consider it appropriate to note the legislative history for confirmation of our understanding of Congress' intent.") (alteration in original) (citations omitted); United States v. Wake, 948 F.2d 1422, 1431 (5th Cir. 1991) ("In reaching our reading of the statute, it is not necessary to look to its legislative history. This notwithstanding, our reading is entirely consistent with that history."); Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 281 (5th Cir. 1998) ("Our reading, mandated by the plain wording of the statute, is confirmed by decision from at least 15 other States. . . ."); Withrow v. Roell, 288 F.3d 199, 203 (5th Cir. 2002) ("Because the statute's language is plain, and its application does not lead to absurd results, we need not look to its legislative history. In any event, that history supports this construction."). One possible explanation for such passages is that they distinguish cases that might hinge on interpretive theory from those that do not; where the legislative history and the text speak with the same voice, for instance, there is no need to resolve their general relationship in particular cases, although it is evident that in cases posing a genuine conflict, Judge Barksdale himself would adhere to text.

### *A. The Subordination of Policy Concerns*

The Judge has several times confronted statutes in tension with what seemed to the Judge to be sound policy. However, where such tension has fallen short of the sort of absurdity that would warrant the inference that Congress could not have intended the result, the Judge has steadfastly followed what Congress has said rather than his own notions of policy.

*Folse* in 1995 held that the language of 9 U.S.C. § 10 (referring to "the district wherein the *award was made*" and to "an order vacating the *award*") allowed an arbitration process to be challenged in federal court only after it had been seen through to a final award, even though such a requirement imposed the same sort of costs that the arbitration process was designed to avoid. Clear statutory text trumped these concerns: "[I]t is more than unfortunate that the arbitration process, designed to resolve disputes in a timely and cost-efficient manner, has failed the expectations of at least one, if not both, of the parties. Nonetheless, our directive in this case is clear . . . ."[44]

*Johnson* in 1997 considered but rejected using the absurd-results canon in holding that the tax-return-confidentiality requirement in 26 U.S.C. § 6103(a) can sometimes apply to information that has been disclosed in court. Judge Barksdale noted the strong temptation to depart from the text: "At first—even second, third, or fourth—glance, it appears that, to find a violation of § 6103 for disclosure of tax return information that was in most, if not all, respects previously disclosed in a court proceeding, is to reach an absurd result."[45] However, the Judge resisted this temptation on the basis of other parts of the statute that make explicit provision for information disclosed in court; given that material, "it is difficult to conclude that Congress' failure to include an exception for 'public record' tax return information in the exceptions to § 6103 was unintentional."[46] Other circuits' approaches, while admittedly attractive to the

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[44] Folse v. Richard Wolf Med. Instruments Corp., 56 F.3d 603, 606 (5th Cir. 1995).
[45] Johnson v. Sawyer, 120 F.3d 1307, 1319 (5th Cir. 1997).
[46] *Id.* at 1321.

Judge on policy grounds, unfortunately "fl[y] in the face of § 6103."[47]

*Whitehead* in 1998 considered whether the joint-and-several-liability-limiting statute in Miss. Code Ann. § 85-5-7 applied when a defendant tortfeasor's negligence combined with a third party's intentional criminal behavior. The statute provided that in general, a tortfeasor would pay only "the amount of damages allocated to him in direct proportion to his percentage of fault," while also providing that "'[f]ault' shall not include any tort which results from an act or omission committed with a specific wrongful intent." The obvious sort of motivation for the "fault" definition was to keep intentional tortfeasors from reducing their liability if their intentional misbehavior combines with another's actions to produce an injury. However, Judge Barksdale held that because the apportionment language's reference to "percentage of fault" was also limited by the unqualified no-intentional-torts definition of "fault," a negligent defendant also could not reduce his liability where the third-party contribution was intentional, even though there was no obvious policy fostered by that exclusion.[48]

*Krieser* in 1999 held that in requiring post-judgment interest to run from "the date of the entry of the judgment," 28 U.S.C. § 1961 did not allow a district court who erroneously delayed the entry of judgment for four months to correct his mistake by ordering post-judgment interest to run from the date of the verdict.[49] While the Judge noted that "the district court reasoned understandably that [the plaintiff] should not be penalized for a delay which he did not cause,"[50] and recognized "the powerful intuition that a plaintiff should not be deprived of his judgment earning interest during a delay which he did not

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[47] *Id.* at 1322.

[48] Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 281 (5th Cir. 1998). Judge Barksdale's relatively swift application of the statutory text might be usefully contrasted with the much more extensive analysis by Judge Southwick, now on the Fifth Circuit but then on the Mississippi Court of Appeals, in Dawson v. Townsend & Sons., Inc., 735 So. 2d 1131, 1135-42 (Miss. App. 1999) (analyzing in great detail the legislative history of § 85-5-7, ultimately coming to the same conclusion as *Whitehead*).

[49] Krieser v. Hobbs, 166 F.3d 736, 745-47 (5th Cir. 1999).

[50] *Id.* at 746.

cause,"[51] as well as "the district court's good, admirable, and equitable intentions,"[52] he concluded that "[t]he statute is clear; postjudgment interest can run only from entry of judgment."[53]

*Peavy* held in 2000 that 18 U.S.C. § 2520 did not allow for a private right of action against those who procure others to perform illegal wiretapping, because the relevant statutory language had been deleted from the civil-liability section, even though such procuring continued to violate criminal law under 18 U.S.C. § 2511(1)(a).[54] There seemed to be no particular reason for eliminating such civil liability while retaining criminal liability, or indication in the legislative history that Congress wanted such a result, but the "plain, unambiguous language" was conclusive; "we must assume Congress meant what it said in the amendment."[55]

*Lovick* in 2004 held that under the Texas usury law, a brokerage fee does not count as disguised interest where the statute explicitly allows such a fee. The Judge conceded that "[t]o say the least, a $1500 fee for a $2000 loan is more than questionable"[56] and "we are more than well aware that a $1500 fee for a $2000 loan appears quite excessive"[57] but concluded with evident reluctance that "we are compelled to follow the law. . . ."[58]

*Martinez* held in 2008 that "lawful entry [as a permanent resident] . . . after inspection and authorization" in 8 U.S.C. § 1101(a)(13)(A), relevant to whether an alien was entitled to seek a waiver of inadmissibility, does not encompass an alien who initially enters the United States as a visitor, but then has his status adjusted to be a lawful permanent resident. Despite the Government's argument that there was no good reason for Congress to deny the opportunity to seek inadmissibility waivers to those who entered the country as LPRs, but not to those who were later adjusted to such status, the Judge held that "we are

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[51] *Id.*
[52] *Id.* at 747.
[53] *Id.*
[54] Peavy v. WFAA-TV, Inc., 221 F.3d 158, 168-69 (5th Cir. 2000).
[55] *Id.* at 169.
[56] Lovick v. Ritemoney Ltd., 378 F.3d 433, 438 (5th Cir. 2004).
[57] *Id.* at 443.
[58] *Id.*

not at liberty to override the plain, unambiguous text" of the statute.[59]

### *B. Keeping Interpretation Simple*

Several cases display the Judge's preference for the discussion of interpretive issues to begin and end with a clear statutory text, rather than opening the door unnecessarily to legislative history or other more complicated inquiries.

Judge Barksdale's 1991 *Moody* opinion refuses to limit the reach of the bankruptcy-fraud provision in 18 U.S.C. § 152 ¶ 7 ("Whoever . . . in contemplation of a case under title 11 . . . or with intent to defeat the provisions of title 11, knowingly and fraudulently conceals any of his property or the property of such other person or corporation" shall be imprisoned and/or fined) to apply only to pre-petition misbehavior,[60] dismissing the argument by very briefly stressing the word "or": "[T]he phrase 'with intent to defeat the provisions of title 11' is in the disjunctive to the phrase 'in contemplation of a case under title 11.' And . . . the paragraph does not use the term 'property of the debtor.' Accordingly, there is no need to dissect the Bankruptcy Code. We will not give the plain wording and meaning of ¶ 7 the strained, hypertechnical reading urged by Moody."[61]

*Bank of Scotland* held in 2000 that because the penalty-wages lien in 46 U.S.C. § 10313(g) of the Ship Mortgage Act applies only to the "master or owner" of a vessel, it would not apply to the proceeds of the sale of a vessel where, because of a preferred mortgage lien against the vessel, the owner has no interest in those proceeds; while the Judge conducted an extensive review of the history of admiralty's treatment of penalty-wages liens, ultimately the plain "master or owner" language controlled.[62]

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[59] Martinez v. Mukasey, 519 F.3d 532, 545 (5th Cir. 2008).

[60] United States v. Moody, 923 F.2d 341, 345-48 (5th Cir. 1991).

[61] *Id.* at 347.

[62] Governor & Co. of Bank of Scot. v. Sabay, 211 F.3d 261, 276 (5th Cir. 2000). The Judge avoided making a joke about an "underwater" ship. *Cf.* Rhesa Hawkins Barksdale, *Tribute to John Minor Wisdom*, 20 MISS. C. L. REV. 235, 236 (2000) ("An admiralty case does not call for a reference to the court's 'steering its way through the

*Chenowith* in 2006 held that 18 U.S.C. § 921(a)(20)'s permission for gun ownership by those whose civil rights have been restored and whose certificate restoring civil rights did not indicate that he could not possess a gun governed, despite cases from the Fourth, Sixth, and Tenth Circuits following contrary legislative history and would look to state law more broadly, rather than merely the certificate restoring civil rights.[63] The Judge quoted an earlier case: "A resort to legislative history is uncalled for . . . because [§ 921(a)(20)'s] instructions are clear."[64]

*Franks Investment* held in 2008 that 49 U.S.C. § 10501(b)'s broad statement that "[t]he jurisdiction of the [Surface Transportation] Board over . . . transportation by rail carriers . . . is exclusive" and that "the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law" preempted a state-law action seeking to prevent the removal of railway crossings, disagreeing with courts that have followed legislative history rather than the text of the statute: "[W]e need not stray from the ICCTA's plain statutory language to its legislative history."[65]

*Gutierrez-Avascal* held in 2008 that a drug conspiracy under 21 U.S.C. § 846 is subject to a restitution order, because the statute provides that conspirators are subject to the same penalties as those for the underlying offense.[66] The Judge dismissed the defendant's "tools of statutory interpretation and legislative history" because "[t]he language of § 846 is clear," and "[w]e need not look beyond this plain language."[67]

### *C. Close Attention to Small Details in Language*

A number of Judge Barksdale's opinions turn on a careful analysis of exact statutory language, to the point of concern

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muddy waters.'") (quoting "Wisdom's Idiosyncrasies," a copy of which Judge Barksdale gives to his clerks when they arrive).

[63] United States v. Chenowith, 459 F.3d 635, 638-40 (5th Cir. 2006).

[64] *Id.* at 640 (quoting United States v. Bost, 87 F.3d 1333, 1336 (D.C. Cir. 1996).

[65] Franks Inv. Co. v. Union Pac. R.R., 534 F.3d 443, 449 (5th Cir. 2008), *reh'g en banc granted*, 562 F.3d 710 (5th Cir. 2009).

[66] United States v. Gutierrez-Avascal, 542 F.3d 495, 497-98 (5th Cir. 2008).

[67] *Id.* at 498.

with particular prepositions or articles. *B-727 Aircraft* in 2001 construed the federal-question authority in 28 U.S.C. § 1351 ("civil actions and proceedings *against* . . . members of a [diplomatic] mission") not to apply to suits brought *by* members of Jordan's ambassador.[68] *Naranjo* in 2001 construed 18 U.S.C. § 3583(i) (allowing district courts to "revoke a term of supervised release for violation of a condition of supervised release . . . if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation") to authorize post-term revocation of supervised release where a warrant was issued for a different violation then that supporting revocation, reasoning that while "such violation" would have referred to the same violation justifying revocation, the "such *a* violation" language in the warrant-or-summons requirement did not.[69] *Withrow* held in 2002, disagreeing with the Seventh and Eleventh Circuits, that post-judgment consent to a magistrate-judge referral is too late under 28 U.S.C. § 636(c)(1), because it holds that a magistrate may conduct proceedings "upon"—that is, after—the consent of the parties.[70] *Alliance Health Group* in 2008 held that a forum-selection clause requiring that litigation "shall occur *in* Harrison County, Mississippi" allowed litigation in a federal district court *in* the county, even though it was not a court *of* the county.[71] "We reject [the party's] attempt to render 'in' and 'of' synonymous."[72]

Small bits of language alone, however, are not the Judge's exclusive focus, to the complete neglect of their functional role. Judge Barksdale's 1991 *Wake* opinion read 21 U.S.C. § 845a(a)'s prohibition of "possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of [a school]" to cover a defendant who possesses drugs within the school zone, but might intend to distribute them

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[68] *In re* B-727 Aircraft Serial No. 21010, 272 F.3d 264, 273-75 (5th Cir. 2001).

[69] United States v. Naranjo, 259 F.3d 379, 382-83 (5th Cir. 2000). *Cf. id.* at 384 (Garwood, J., dissenting) (disagreeing with "the majority's virtually total reliance on the article 'a'").

[70] Withrow v. Roell, 288 F.3d 199, 203 (5th Cir. 2002).

[71] Alliance Health Group v. Bridging Health Options, 553 F.3d 397, 399-402 (5th Cir. 2008).

[72] *Id.* at 400.

elsewhere.[73] He noted that earlier cases had endorsed a presumption of intent to distribute merely from the possession of more drugs than could be consumed personally.[74] Accordingly, because the possession-with-intent-to-distribute crime was not tied to particular distribution plans, the school-zone version of the crime forbad possession of "a felony quantity of a controlled substance—that is, an amount that evidences an intent to distribute the drugs somewhere" within the school zone.[75] *Wake* illustrates that the Judge's textualism is not tied exclusively to grammar—here, whether the adverbial restriction "within one thousand feet of a school" would apply to the verb "distribute" as well as the verb "possessing." Rather, as the Judge points out, quoting the Supreme Court, "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."[76] The statutory language is the focus, but the language is construed in light of its functional context.

### *D. A Presumption for Ordinary Language*

The Judge's opinions have several times resisted the overextension of technical legal definitions from one context to another. Absent an indication that a technical definition should apply beyond a particular context in which it appears, the Judge uses the ordinary meaning of terms elsewhere. *Solis-Campozano* held in 2002 that "alien smuggling" in Sentencing Guideline 2L1.2(b)(1)(A)(viii) includes transporting aliens within the United States, not merely taking them across the border. The plain language of "smuggling" controlled, notwithstanding other guidelines that seemed to distinguish "smuggling" from "transportation" and contrary statutory definitions of "smuggling" elsewhere: "No authority need be cited for the rule that such plain meaning controls, unless it leads to an ab-

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[73] United States v. Wake, 948 F.2d 1422, 1429-34 (5th Cir. 1991).
[74] *Id.* at 1430.
[75] *Id.* at 1431.
[76] *Id.* at 1430 (quoting Crandon v. United States, 494 U.S. 152 (1990)).

surd result."[77] *Crittenden* in 2004 construed "counterfeit substance" in Sentencing Guideline 4B1.2 to include simulated

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[77] United States v. Solis-Campanzano, 312 F.3d 164, 166 (5th Cir. 2002). "No authority need be cited" is a well-worn Barksdalism. The Judge has been known, in fact, to replace actual citations of authority in drafts with such explanations. For other refusals to cite authority for too-basic propositions, see Houston Chronicle Pub. Co. v. City of League City, 488 F.3d 613, 617 (5th Cir. 2007) ("No authority need be cited for our clear-error standard of review for findings of fact."); Financial Acquisition Partners v. Blackwell, 440 F.3d 278, 284 (5th Cir. 2006) ("No authority need be cited for the rule that a reviewing court will consider an issue properly presented to a district court, even though not addressed by it."); Arsement v. Spinnaker Exploration Co., 400 F.3d 238, 247 (5th Cir. 2005) ("No authority need be cited for the rule that, generally, we do not consider an issue first raised at oral argument on appeal."); Guidry v. Dretke, 397 F.3d 306, 319 (5th Cir. 2005) ("[N]o authority need be cited for the rule that we, not the parties, select the appropriate standard of review, including whether an issue will even be addressed if not raised in district court."); *id.* at 320 ("[N]o authority need be cited for the well-established rule that, after conditional habeas relief was granted, the State was *not* required to move the district court to reconsider its having ordered the hearing in order for the State to preserve this narrow issue for review."); Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 345 (5th Cir. 2004) ("No authority need be cited for the rule that, generally, we do *not* review an issue not presented in district court."); Brazoria County v. EEOC., 391 F.3d 685, 688 (5th Cir. 2004) ("No authority need be cited for the fact that jurisdiction is *always* at issue; without it, a court is powerless to act."); McClure v. Ashcroft, 335 F.3d 404, 408 (5th Cir. 2003) ("No authority need be cited for the rule that courts should avoid constitutional decisions as much as possible."); GDF Realty Invs. v. Norton, 326 F.3d 622, 627 (5th Cir. 2003) ("No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States."); United States v. Cyprian, 197 F.3d 736, 741 (5th Cir. 1999) ("No authority need be cited for the rule that points on appeal are abandoned if *not* briefed adequately."); United States v. Muhammad, 165 F.3d 327, 330 (5th Cir. 1999) ("No authority need be cited for the long-established rules that personal, but *not* subject matter, jurisdiction can be waived; that we examine subject matter jurisdiction throughout a proceeding, concomitantly raising the issue *sua sponte* if need be; and that we freely review jurisdictional questions."); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997. ("No authority need be cited for the necessary and longstanding rule that, absent a change in the law, a decision by our court is binding on subsequent panels."); United States v. Condren, 18 F.3d 1190, 1198-99 (5th Cir. 1994) ("No authority need be cited for the fact that theft is a close and ever present partner of illegal drugs, either to steal the drugs, or to steal money or other items to purchase them."); Lloyd v. John Deere Co., 922 F.2d 1192, 1194 (5th Cir. 1991) ("No authority need be cited for the rule that for this diversity action, Mississippi's substantive law is applied.").

On the subject of Judge Barksdale's style, I would be remiss to fail to note a few of the Judge's idiosyncrasies in punctuation. On the very first day of our clerkship, the Judge commended to us WILLIAM STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE (3rd ed. 1979), as well as Judge Wisdom's similar paean to brevity, *see* Barksdale, *supra* note 62, at 236 ("One word instead of two; two instead of three, five—so on."). However, I soon found out that the Judge dissented from their very first rule—put an "s" after the apostrophe even for possessives ending in "s," such as "Charles's." *See* Fields v. Johnson, 159 F.3d 914, 914 (5th Cir. 1998) ("Fields' motion for appointment of counsel on appeal is DENIED."). (Strunk and White make an exception for "Moses" and "Jesus." *See*

drugs, holding that the ordinary meaning of the word "counterfeit" controlled, rather than the much more limited trademark-style meaning the phrase receives in 21 U.S.C. § 802(7).[78]

However, despite the Judge's resistance to the use of technical definitions outside their proper context, he has given due regard to Congress's authority to use words as it sees fit, even if ordinary people use words differently. *Steve Jackson Games* in 1994 construed "intercept" in the Wiretap Act, noting that the definition of "electronic communication" did not include storage, though the definition of "wire communication" (a term used regarding the transmission of "aural transfer") did include such storage.[79] Accordingly, the retrieval by the Secret Service of electronic bulletin-board messages that had not yet been read by recipients did not count as "intercepts." *West Texas Marketing* in 1995 held that the bankruptcy estate did not count as a "successor to the debtor" under the rule of 11 U.S.C. § 505(b) discharging tax liability where the IRS does not act in a timely way, because such a "successor" must be an individual, partnership, or corporation, but the bankruptcy estate is instead comprised of a collection of interests.[80] The Judge also relied on the

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STRUNK & WHITE, *supra*, at 1.) *See, e.g.*, Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 461 (5th Cir. 1994) ("Congress' intent"). The Supreme Court has divided over the issue. *Compare* Kansas v. Marsh, 548 U.S. 163, 167 (2006) (Justice Thomas's majority opinion) ("Kansas' capital sentencing statute"), *with id.* at 182 (Scalia, J., concurring) ("Kansas's death penalty statute"); *id.* at 203 (Souter, J., dissenting) ("Kansas's capital sentencing statute"). The Judge also habitually puts quotation marks inside periods if he is not quoting an entire sentence, as if he were British, *see, e.g.*, Jones v. Jones, 163 F.3d 285, 289 (5th Cir. 1998) (reference to jurors "'unwilling to impose the consequences of a guilty as charged verdict'."); FREDERICK C. CREWS, THE RANDOM HOUSE HANDBOOK 300 (1980) ("Commas and periods should be placed inside the closing quotation marks in all circumstances."); MERRIAM-WEBSTER'S MANUAL FOR WRITERS & EDITORS 31-32 (1998) ("In British usage, commas and periods following quoted material go inside only those quotation marks that enclose material that originally included the period or comma."). A full treatment of Judge Barksdale's punctuation is, alas, beyond my scope here, but would surely discuss his perhaps-excessive love of hyphenated legal expressions, commas, italics, and parentheses.

[78] United States v. Crittenden, 372 F.3d 706, 708-09 (5th Cir. 2004).

[79] Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 461-62 (5th Cir. 1994).

[80] *In re* W. Tex. Marketing Corp., 54 F.3d 1194, 1200 (5th Cir. 1995).

distinction of the estate from "successor to the debtor" in another statutory section.[81]

### *E. Textualism in Contract Interpretation*

Judge Barksdale's textualism also appears in his contracts opinions. His 1992 opinion in *Seal* considered the relationship between a 1976 Trust Agreement and a 1979 Employment Contract, refusing to use provisions for "non-actual termination" in the 1979 agreement to construe royalty provisions in the 1976 contract that hinged on termination.[82] His 1993 *Illinois Central* opinion construed contractual language barring "omissions that will . . . create an obstruction of the sight zone" to create an obligation to clear and maintain sight zones: "Although the provision may be poorly worded, this does not constitute ambiguity or render the provision unclear."[83] Absent ambiguity or absurdity, no extrinsic evidence was relevant.[84] *Williamson* in 1998 considered whether money received under a "take-or-pay" settlement that required payments even for natural gas that was not received fell under a lessee's obligation to make royalty payments

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[81] *Id.* (citing 11 U.S.C. § 505(c)). For other instances of Judge Barksdale's textualism, *see* United States v. Condren, 18 F.3d 1190, 1195-98 (5th Cir. 1994) (Sentencing Guideline § 2K2.1(b)(5)'s sentencing enhancement for firearm possession "in connection with" drug possession satisfied by simultaneous possession of a gun and drugs in close proximity, because the issue was controlled by the "ordinary and natural meaning" of the term "connection."); Sta-Home Home Health Agency v. Shalala, 34 F.3d 305, 309 (5th Cir. 1994) (portions of salary donated back to their employer were not "actually incurred" under the Medicaid reimbursement rule in 42 U.S.C. § 1395o, given that the money designated as donations "never left [the employer's] account and was never paid to those employees."); United States v. Meeks, 69 F.3d 742, 744-45 (5th Cir. 1995) (18 U.S.C. § 656's ban on theft by anyone "connected in any capacity with" a federally-insured bank encompassed theft by an employee of the locksmith company working for the bank, because the ordinary meaning of such language does not require any sort of relationship of trust); United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003) ("trigger" in 26 U.S.C. § 5845(b)'s definition of a machine gun includes a switch that turns on a motor that in turn presses the gun's original trigger); United States v. Brown, 470 F.3d 1091, 1096 (5th Cir. 2006) (Sentencing Guideline 3C1.1 (obstruction of justice "during the course of the investigation, prosecution, or sentencing of the instant offense") did not apply to a defendant who had been a fugitive for an unrelated crime and only charged with the instant, felon-in-possession offense after he was in custody; "a plain reading of § 3C1.1" required such a result).

[82] Seal v. Knorpp, 957 F.2d 1230, 1235-37 (5th Cir. 1992).

[83] Ill. Cent. R.R. v. R.R. Land, Inc., 988 F.2d 1397, 1407-08 (5th Cir. 1993).

[84] *Id.* at 1408 (quoting LA. CIV. CODE ANN. art. 2046).

for "gas produced from said land . . . when sold by lessee," holding that such language does not apply unless gas is actually produced and delivered.[85] "Equitable considerations do not come into play," the Judge said, where "an issue is expressly covered by language in a lease."[86] Highlighting the impartiality of textualism, the Judge pointed out that adhering to contractual text cuts both ways: "In [an earlier case,] this court held that, under Mississippi law, the provisions in the lease controlled, even though, in that case, the gas producer was economically disadvantaged. This time, it appears that it is the royalty owners who are adversely affected by the enforcement of the lease."[87] *Valdez-Sanchez* held in 2005 that revocations of supervised release and probation do not count as "additional charges" per a plea agreement, because the underlying charges for those crimes were pre-existing.[88] *Foulston-Siefkin LLP* held in 2006 that a provision in a trust agreement "reimbursement" for costs "incurred" did not apply to a lawyer's costs that he had not been required to pay himself, but were instead paid by his law firm: "Because [the lawyer] is not out any money, and never will be, there is nothing 'to pay [him] back or compensate [him] for', even if he did *incur* expenses at some point."[89] *Bulko* held in 2006 that an inactive member of a bar could count as an "attorney" under the "plain language" of an arbitration agreement, particularly given the NASD's discretion to manage its arbitrators.[90]

### *F. The Limits of Textualism: Absurd Results*

The Judge's textualism is not, of course, unyielding. He most prominently relied on the absurd-results doctrine in his 2002 and 2004 panel and en banc dissents in *Kinney*, arguing that even if the literal terms of 42 U.S.C. § 1985 forbid a state from making employment decisions based on its employees' or

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[85] Williamson v. Elf Aquitaine, Inc., 138 F.3d 546, 550-52 (5th Cir. 1998).

[86] *Id.* at 552.

[87] *Id.*

[88] United States v. Valdez-Sanchez, 414 F.3d 539, 541-42 (5th Cir. 2005).

[89] Foulston-Siefkin LLP v. Wells Fargo Bank of Tex., 465 F.3d 211, 215 (5th Cir. 2006).

[90] Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 626 (5th Cir. 2006).

prospective employees' expert testimony, such a result would be absurd.[91] In one way, Judge Barksdale's reliance on the absurdity canon in his *Kinney* dissents display a similar sort of refusal to misconstrue clear statutory text as his more straightforwardly textualist opinions: rather than say that the text really means something different from what it seems to, he admits forthrightly that he reaches his conclusion based only on the absurdity of the result.[92]

## III. CONSTITUTIONAL LAW

In general, Judge Barksdale has not frequently used constitutional law to assert judicial supremacy over elected legislatures or executive officials. Judge Barksdale's description of Justice Byron White also describes himself: "His opinions reflect his unwavering confidence and faith in our majoritarian, democratic system. He understands the limited role of the courts, especially the federal courts, in that system, feeling confident that the affairs of our nation are best managed by its people and their elected representatives."[93]

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[91] Kinney v. Weaver, 301 F.3d 253, 291 (5th Cir. 2002) (Barksdale, J., dissenting) ("[E]ven where a statute's meaning is plain, 'we may depart from its meaning . . . to avoid a result so bizarre that Congress could not have intended it'. This is just such an instance.") (quoting Moosa v. INS, 171 F.3d 994, 1008 (5th Cir. 1999) (Barksdale, J., majority opinion)); Kinney v. Weaver, 367 F.3d 337, 377 (5th Cir. 2004) (en banc) (Barksdale, J., dissenting) (same). The Judge began his Kinney en banc dissent by quoting Thomas Hobbes: "The privilege of absurdity; to which no living creature is subject but man only." *Kinney*, 367 F.3d at 374-75 (Barksdale, J., dissenting)(quoting THOMAS HOBBES, Leviathan pt I, ch. 5 (1651)).

[92] The Judge's brief special concurrence in Piggly Wiggly Carksville, Inc. v. Mrs. Baird's Bakeries, 177 F.3d 380 (5th Cir. 1999), exhibits a similar desire not to distort plain text, even when he might come to the same result by different means. The issue there was whether the trial court properly declined to impose sanctions for the violation of the terms of a settlement and resultant court order. *Id.* at 382. The Judge contended, contrary to the majority, that the "plain wording" of the settlement had been violated, and would rest instead on the district court's discretion to acknowledge that "reasonable persons can differ on this point." *Id.* at 384 (Barksdale, J., specially concurring).

[93] Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 6 (1993).

### *A. The Establishment Clause*

Judge Barksdale has written only three opinions on the Establishment Clause, but all three have covered controversial—and energetically-controverted—issues: governmental use of religious symbols, the treatment of evolution in the public-school curriculum, and permissible bounds on legislative prayer. *Murray*, from 1991, allowed the City of Austin to retain its city seal despite the inclusion of a relatively-small cross derived from Stephen F. Austin's family crest.[94] Judge Barksdale's 2000 dissent-from-denial-of-rehearing-en-banc in *Freiler* disagreed with the panel's invalidation of a school board's adoption of a disclaimer to precede the teaching of evolution.[95] Judge Barksdale's 2006 panel opinion in *Doe v. Tangipahoa Parish*, in which he wrote for himself alone with dissents on both sides, would have set limits on sectarian or proselytizing legislative prayer, but without considering other sorts of prayer.[96]

All three of these opinions represent the struggle to apply a neutrality norm that bars government from promoting or inhibiting religion (either in purpose or primary effect).[97] A key issue in all three opinions is the baseline with respect to which such promotion or inhibition is to be measured.[98] Without a clear baseline, a neutrality norm is meaningless; proponents of an Establishment Clause claim can always find some level of hos-

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[94] Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).

[95] Freiler v. Tangipahoa Parish Bd. of Educ., 201 F.3d 602 (5th Cir. 2000) (Barksdale, J., dissenting from the denial of rehearing en banc).

[96] Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006). As Professor Lund describes, the en banc court later found insufficient evidence of standing, over Judge Barksdale's energetic dissent. *See* Andrew C.W. Lund, *The Importance of Lawyers in Judge Barksdale's Writings*, 79 MISS. L.J. 301, 312-14 & nn. 45-52 (2010).

[97] *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Id.*

[98] *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 6 (1989) ("To determine whether religion has been 'aided' or 'penalized' (terms the Court has used synonymously with 'advanced' and 'inhibited') one needs a baseline: 'aid' or 'penalty' as compared to what?").

tility to religion relative to which its actual policies promote religion, while critics can always find a level of encouragement for religion relative to which its actual policies are actually hostile to religion. The Judge noted in *Murray* that "requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion."[99] One way to put the point would be that we should take as a baseline a background culture allowing the noncoercive display of religious symbols, as well as other symbols, in public. Against such a baseline, allowing a city named in honor of Stephen F. Austin to display the Austin family crest, even if that crest includes a cross, can be considered merely as a neutral acknowledgment of the religious tradition of the Austin family, while requiring its removal would be impermissibly hostile to such traditions.

In *Freiler*, the Judge would have allowed a local school board to append a disclaimer to the teaching of evolution in the curriculum stating that "the Scientific Theory of Evolution . . . should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept."[100] Against a baseline including a disclaimerless evolution lesson, of course, the addition of the disclaimer might seem to favor religious views of human origins. Against a baseline *not* including the teaching of evolution, however, it would not impermissibly favor religion relative to such a baseline to (a) teach in the school curriculum a non-religious view of man's origin that historically has competed with religious views on the topic, and then (b) mention the existence of other religious views in the brief disclaimer.[101] As the Judge put

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[99] *Murray*, 947 F.2d at 158.

[100] *Freiler*, 201 F.3d at 604.

[101] Indeed, it might seem that because the evolutionary account is actually *included in the curriculum*, while the biblical view is merely *mentioned*, such an approach would in fact still be hostile to a biblical view of origins. Justice Scalia suggested such a point in his dissent from the denial of certiorari:

> [T]he theory of evolution is the only theory actually *taught* in the Tangipahoa Parish schools. As the introductory paragraph of the resolution suggests, the disclaimer operates merely as a (perhaps not too believable) 'disclaimer from endorsement' of that single theory, and not as an affirmative endorsement of any particular religious theory as to the origin of life, or even of religious theories as to the origin of life generally. Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting).

it, he said that "in seeking to enforce constitutionally mandated neutrality, the panel has strayed, no doubt unintentionally, into intolerance."[102] As the Judge put the point,

> The theory of evolution may be viewed by some as anti-religious. The disclaimer recognizes this historic tension between evolution (scientific concept) and other theories or concepts about the origin of life and matter, using the "Biblical version of Creation" as but an *example* of such other concepts. . . . The disclaimer balances; it neutralizes; it is consistent with the requisite neutrality. . . .
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> . . . .
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> The curriculum provides students with information about *only one concept* (evolution). The disclaimer's mere mention of the existence of other concepts, *without presenting any information about the content of those concepts,* neither gives any preferred status to, nor advances, any other concept, which students must make an additional effort to consider or learn, *outside the classroom.* [103]

Finally, in *Doe*, the Judge again encountered an Establishment Clause challenge involving the Tangipahoa Parish School Board. This time, however, the issue was their public meetings, and this time, the Judge ruled against them. The Judge noted his own earlier characterization in *Murray* of the legislative prayers approved by the Supreme Court: they "showed 'absolutely no evidence of an intent to proselytize, or advance, any religion, and no threat of an establishment of religion.'"[104] The Tangipahoa Parish School Board's pattern of legislative prayers, however, "at minimum aggressively advocated" Christianity.[105] At the same time, the Judge noted that the district court's injunction against *any* prayer at school board meetings went beyond what was necessary to decide the case, and threatened the

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[102] *Freiler*, 201 F.3d at 603.

[103] *Id.* at 606.

[104] *Doe*, 473 F.3d at 197 (quoting *Murray*, 947 F.2d at 155, characterizing the prayers in Marsh v. Chambers, 463 U.S. 783 (1983)).

[105] *Id.* at 204 (quoting Snyder v. Murray City Corp., 159 F.3d 1227, 1234 (10th Cir. 1998)).

"tolerable acknowledgment of beliefs widely held among people of this country."[106] Again, the task of enforcing the Establishment Clause involves distinguishing the sort of acknowledgement that would simply reflect the background religious traditions of American culture from the sort of promotion of particular views that would depart from such a baseline.

### *B. Freedom of Speech and Association*

Judge Barksdale's constitutional opinion with the most rhetorical flourishes is probably *Louisiana Debating and Literary Association* from 1995, upholding the confidentiality of New Orleans social clubs' membership lists on freedom-of-association grounds.[107] He referred to

> this classic confrontation of competing governmental interests and individual rights; interests and rights that bring into play "our Federalism" on the one hand, and federal courts' protection of constitutional rights on the other; a balancing of governmental interests and individual rights that reflects the majesty and scope of our living Constitution.[108]

The Judge concluded that "the City has failed to meet its burden of demonstrating how the means it has selected to enforce the Chapter are the least intrusive on the Clubs' and their members' right of private association."[109] The Judge ended his opinion,

> Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs

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[106] *Id.* at 198 (quoting *Marsh*, 463 U.S. at 792). Judge Stewart's panel dissent would have found that the legislative prayers at issue in *Marsh* were not sufficiently analogous to the school-board prayers in *Doe*, *see id.* at 209 (school board prayers are "a new set of factual circumstances that are completely distinct from the legislative arena"), while Judge Clement would have found Marsh to allow prayers as long as they did not improperly "exploit" the platform to advance religion, which, as she read the record, had not been shown, *id.* at 215 ("the Board has affirmatively stated, through the stipulated and offered testimony, its willingness to allow any viewpoint to be heard at the meetings").

[107] La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995).

[108] *Id.* at 1488.

[109] *Id.* at 1500.

> is debatable among persons of good will. But, the Constitution trumps; those clubs have a right of private association under the First Amendment with which the government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle". . . . [W]hen persons seek to vindicate constitutional rights in federal court, they will be heard, absent more compelling reasons under that same Constitution for the court to stay its hand.[110]

Three of Judge Barksdale's freedom-of-speech opinions deal with public employees (all lead plaintiffs beginning with "K"): *Knowlton* in 1992,[111] his en banc opinion in *Kinsey* in 1992,[112] and his panel dissent in *Kinney* in 2002.[113] The Judge's opinions in these cases avoided turning private disputes into First Amendment controversies[114] and recognized the importance of flexibility on the part of governments in dealing with disruptive employee speech.[115]

Three times Judge Barksdale has considered the free-speech rights of sexually-oriented businesses: *LLEH* in 2002,[116] *Baby Dolls* in 2002,[117] and his *Reliable Consultants* dissent in 2008.[118] While the Judge generally was sympathetic with the

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[110] *Id.*

[111] Knowlton v. Greenwood Indep. Sch. Dist., 957 F.2d 1172 (5th Cir. 1992).

[112] Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988 (5th Cir. 1992) (en banc) (plurality opinion).

[113] Kinney v. Weaver, 301 F.3d 253, 291 (5th Cir. 2002) (Barksdale, J., dissenting).

[114] *Knowlton*, 957 F.2d at 1178 (cafeteria workers complaints about being compelled to "volunteer" at evening school board meetings reflect "private, not public, concerns," though their FLSA judgment was affirmed).

[115] *Kinsey*, 950 F.2d at 996 (school board allowed to dismiss school superintendent who had opposed the election of the majority slate on the school board, because the board was "dependent upon [the superintendent], its chief administrator, to implement its policies and decisions" and the superintendent had "power to 'make or break' Board policies"); *Kinney*, 301 F.3d at 294 (police instructors' expert testimony against police officers "impeded their performance in the classroom by undermining the enrolling entities' trust in Plaintiffs as teachers and interfered with the regular operation of the [police academy]," the government's "interests in effective training of their law enforcement personnel (necessary for the efficient provision of public services) far outweigh Plaintiffs' interests in providing expert testimony").

[116] LLEH, Inc. v. Wichita County., 289 F.3d 358 (5th Cir. 2002).

[117] Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471 (5th Cir. 2002).

[118] Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008) (Barksdale, J., dissenting).

desire of communities to deal with the secondary effects of sexually-oriented businesses,[119] he did agree with the court in *Reliable Consultants* that the sex-toy-store's commercial-speech claim could go forward, though its litigation posture might have been premature.[120]

Two of the Judge's opinions consider the regulation of speech in special locations, showing in both cases sympathy for the public's need to promote safety: *Houston Chronicle* in 2007, dealing with the distribution of newspapers at street intersections,[121] and his dissent in *Vasquez* in 2001, dealing with the canvassing rules that apply in public housing.[122]

Several other cases also address free speech. *Peavy* in 2000 dealt with the intersection of the First Amendment with state and federal wiretap acts, rejecting a claim by a newspaper that had participated in some of the wiretapping at issue.[123] *Cornish* in 2005 held that a private operator of a juvenile detention facility was not acting under color of state law toward employees claiming their dismissal violated the First Amendment; while providing juvenile correctional services was obviously state ac-

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[119] *LLEH*, 289 F.3d at 367 (allowing a growing rural community to attempt to "successfully sidestep many of the problems encountered by urban areas"); *Baby Dolls*, 295 F.3d at 481 ("[W]e must determine whether, under this *reasonable belief* standard, the City's evidence demonstrates a *link* between its interest in combating secondary effects and the Ordinance. That standard is satisfied.").

[120] *Reliable Consultants*, 517 F.3d at 748-49 ("[T]he commercial-speech claim (advertising) may be premature," but concurring in the vacatur of the dismissal of the claim).

[121] Houston Chronicle v. City of League City, 488 F.3d 613, 622 (5th Cir. 2007) (facial validity of statute supported because "proscription serves a compelling interest at the heart of the government's function: public safety").

[122] Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198, 207 (5th Cir. 2001) (Barksdale, J., dissenting) (under nonpublic forum analysis, regulations on door-to-door canvassing in public housing are "a reasonable response to the problem of rampant crime in low-income housing developments"). *Vasquez* was later taken en banc, *see* 289 F.3d 350 (5th Cir. 2002), but not decided because of the death of the only plaintiff to take an appeal. A later panel upheld a revised version of the regulations against a challenge brought by the widow of the original plaintiff. *See* De la O v. Hous. Auth. of El Paso, 417 F.3d 495, 499 (5th Cir. 2005) (recounting *Vasquez* history).

[123] Peavy v. WFAA-TV, Inc., 221 F.3d 158, 188, 193 (5th Cir. 2000) (holding that the use and disclosure provisions of the state and federal Wiretap Acts, as applied to media defendants who "received directly from the interceptors, with full knowledge of the circumstances of the interceptions and with some participation concerning the interceptions," would constitutionally "further substantial governmental interests in protecting the confidentiality of private communications").

tion, employing particular personnel to do so was not.[124] *Moore* in 1995 upheld a thirty day ban on the solicitations of accident victims, holding that under the commercial-speech standard, preservation of victims' privacy was a sufficient interest.[125]

### *C. Takings*

*Washington Legal Foundation* in 2001 struck down on Fifth Amendment takings grounds Texas's Interest-on-Lawyer's-Trust-Accounts program, which funded legal representation for the poor through the interest on money held in lawyers' custody for clients. The issue divided the Fifth Circuit panel, with a dissent by Judge Weiner, just as it divided the Supreme Court itself. *Washington Legal Foundation* had been at the Supreme Court once, the Court finding 5-4 that the money was the property of the client.[126] On remand and following a bench trial, Judge Barksdale's opinion took the takings claim the rest of the way, finding a violation.[127] The Supreme Court, however, later disagreed with Judge Barksdale, again 5-4, this time disfavoring the claim, holding that using interest for other purposes was not an unconstitutional taking where alternative uses for the money would not have produced any benefit to the client.[128]

### *D. Substantive Due Process*

Judge Barksdale has dealt with substantive-due-process claims in four cases. Three of them rebutted complaints against overly-zealous law enforcement: in *Kiser* in 1995, a child-abuse investigation that the plaintiffs claimed continued too long,[129] in

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[124] Cornish v. Corr. Servs. Corp., 402 F.3d 545, 550 (5th Cir. 2005).

[125] Moore v. Morales, 63 F.3d 358, 363 (5th Cir. 1995) (applying then-brand-new Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)).

[126] Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

[127] Wash. Legal Found. v. Tex. Equal Access to Justice, 270 F.3d 180, 186-89 (5th Cir. 2001).

[128] Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Phillips v. Wash. Legal Found., 538 U.S. 942 (2003) (vacating the Fifth Circuit *Washington Legal Foundation* opinion for reconsideration in light of *Brown*).

[129] Kiser v. Garrett, 67 F.3d 1166, 1173 (5th Cir. 1995) (because, "although a substantive due process right to family integrity has been recognized, the contours of that right are not well-defined, . . . especially in the context of a state's taking temporary

*Robertson* in 1995, misinformation given to a juvenile about his exposure to adult sentence,[130] and in *O'Banion* in 1991, money-reporting requirements that apply even if the underlying source of the money is innocent.[131] The Judge's 2008 dissent in *Reliable Consultants* disagreed with the extension of *Lawrence v. Texas* sexual-privacy rights to the commercial distribution of sex toys.[132] All of these opinions are relatively low-key, lacking some of the *sturm und drang* that such disputes produce at the Supreme Court. The *Reliable Consultants* dissent, for instance, merely indicated that he would follow the Eleventh Circuit on the level of scrutiny established by *Lawrence* and on whether *Lawrence*'s constitutional protection for private sexual behavior encompassed public commercial activities as well.[133]

### *E. Fourth Amendment*

Judge Barkdale has written a great many opinions in Fourth Amendment cases, governing all aspects of its doctrine. As he has put it himself, the Court has addressed the reasonable-suspicion standard for a traffic stop "time . . . and time . . . and time again."[134] Much the same could be said of the other areas of Fourth Amendment law. Given the fact-dependent nature of the reasonable-suspicion, probable-cause, consent-to-search, and exigent-circumstances determinations, almost every

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custody of a child during an investigation of possible parental abuse," qualified immunity was appropriate).

[130] Robertson v. Plano, 70 F.3d 21, 24 (5th Cir. 1995).

> We find neither Fourteenth Amendment case law, nor case law construing other constitutional requirements, that would support holding that the Due Process Clause afforded the Robertsons' son (16 years old) a right to be free from an erroneous admonishment regarding punishment and prison. Nor do we find such conduct to be of the type that is violative of substantive due process. *Id.*

[131] United States v. O'Banion, 943 F.2d 1422, 1433-34 (5th Cir. 1991) ("[O]ur role is to evaluate only whether Congress acted within the limits of the due process clause, not whether it could have accomplished its goal through other, less intrusive means . . . . We cannot say that Congress has acted arbitrarily.").

[132] Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008) (Barksdale, J., dissenting).

[133] *Id.* at 749 (for both issues, relying very briefly on Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004)).

[134] United States v. Morales, 191 F.3d 602, 605 (5th Cir. 1999) (ellipses in original).

criminal defendant against whom the police have found evidence through a search has an incentive to consider arguing that the search violated the Fourth Amendment. The vast majority of these claims are rejected, and the Judge has certainly contributed his share.

*Ervin*, the Judge's very first published opinion in 1990, considered the automobile exception to the warrant requirement and found probable cause based (among other factors) on the driver's late arrival and short stay at a suspected smuggling site.[135] *Lopez* in 1990 found reasonable suspicion for a traffic stop based (again, among other factors) on a truck's load and deceleration as officers approached,[136] and found consent for a subsequent search voluntary where a suspect said "[s]ure, go ahead" in response to an officer's request.[137] *Wake* in 1991 found that an affidavit containing some unintentionally-inaccurate information still supported probable cause because its other information was still reliable.[138] *Eastland* in 1993 rejected a novel claim that the violation of state-law trespass rules should result in the exclusion of evidence from federal court even where a search does not implicate the Fourth Amendment because "open fields" do not fall within the Amendment's protection for "persons, houses, papers, and effects."[139] *Leatherman* in 1994 found that drug-production-related odors supported probable cause to issue a warrant.[140] In *Blount* in 1996, a dissent by the Judge vindicated en banc the next year, the Judge held that an informant's indication of the direction of a fleeing suspect supported probable cause and lack-of-warrant-excusing exigent circumstances.[141] *Robertson* in 1995 found that a juvenile was never under arrest, and so not "seized" under the Fourth Amendment.[142] *Maldonado* in 1995 held that an officer did not (plainly)

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[135] United States v. Ervin, 907 F.2d 1534, 1539-40 (5th Cir. 1990).

[136] United States v. Lopez, 911 F.2d 1006, 1008-10 (5th Cir. 1990).

[137] *Id.* at 1010-1011.

[138] United States v. Wake, 948 F.2d 1422, 1428-29 (5th Cir. 1991).

[139] United States v. Eastland, 989 F.2d 760, 765-67 (5th Cir. 1993).

[140] Leatherman v. Tarrant County Narcotics Intelligence, 28 F.3d 1388, 1393-94 (5th Cir. 1994).

[141] United States v. Blount, 98 F.3d 1489, 1501-06 (5th Cir. 1996) (Barksdale, J., dissenting); rev'd, 123 F.3d 831 (5th Cir. 1997) (en banc).

[142] Robertson v. City of Plano, 70 F.3d 21, 24 (5th Cir. 1995).

go beyond a permissible protective frisk in reaching for a bulge that might have been a weapon but turned out to be drugs.[143] *Rodea* in 1996 held that suspects' discovery of drug-enforcement investigators was a lack-of-warrant-excusing exigent circumstance.[144] In his 1996 dissent in *Ho* (which, as noted above, also involved whether a plain-error standard should apply), the Judge would have found probable cause to continue a search of a portfolio from the observation of a blank credit-card-shaped plastic card.[145] The Judge's 1998 dissent in *Miller* would have found probable cause for a traffic stop based on a car's use of a left turn signal as it drove through an intersection.[146] *Morales* in 1999 finds reasonable suspicion for a traffic stop based on a pickup truck's heavy load and fiberglass cover over the truck bed.[147] *Gibbs* in 2005 found officers relied in good faith on a search warrant supported by a drug-dealing-describing affidavit.[148]

The Judge has frequently in Fourth Amendment cases resolved them on the narrowest possible grounds. *Kleinebreil* in 1992 found that officers relied in good faith on a warrant supported by an affidavit with "sufficient 'indicia of probable cause'" regarding drug smuggling; the probable-cause issue itself did not need resolution.[149] *Roberts* in 2001 held that it did not need to decide the full extent of the outbound-border-search exception to a reasonable-suspicion requirement, because reasonable suspicion was present.[150]

In addition to criminal defendants, a great number of civil plaintiffs have pursued Fourth Amendment claims against police, particularly for excessive force. In *Bazan* in 2001, a case in which a suspect was killed, the Judge found that a plaintiff's

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[143] United States v. Maldonado, 42 F.3d 906, 910-13 (5th Cir. 1995). The standard was "plainly" because a plain-error standard applied. *Id* at 909-10.

[144] United States v. Rodea, 102 F.3d 1401, 1407-09 (5th Cir. 1996).

[145] United States v. Ho, 94 F.3d 932, 945-47 (5th Cir. 1996) (Barksdale, J., dissenting).

[146] United States v. Miller, 146 F.3d 274, 281-82 (5th Cir. 1998) (Barksdale, J., dissenting).

[147] United States v. Morales, 191 F.3d 602, 606-07 (5th Cir. 1999).

[148] United States v. Gibbs, 421 F.3d 352, 358-59 (5th Cir. 2005).

[149] United States v. Kleinbreil, 966 F.2d 945, 949-50 (5th Cir. 1992).

[150] United States v. Roberts, 274 F.3d 1007, 1014-16 (5th Cir. 2001).

excessive-force claim survived summary judgment, because the sole surviving witness, the police officer, was an interested witness whom a jury might be entitled to disbelieve.[151] In *Jackson* in 1992, the Judge dismissed on failure-to-state-a-claim grounds a claim with merely conclusory allegations about the reasonableness of officers' use of force (though the plaintiffs were given the opportunity to plead additional facts); the fact that a complaint survived a frivolousness inquiry per 28 U.S.C. § 1915(d) did not preclude failure-to-state-a-claim dismissal per Rule 12(b)(6).[152] *Macias* in 1994 rejected as frivolous a completely unexplained claim that a traffic stop was unconstitutional.[153] In his 1995 dissent in *Dunn*, vindicated en banc the next hear, the Judge held that the Fifth Circuit's "significant injury" excessive-force requirement (itself later overturned by the Supreme Court, but applicable for qualified-immunity purposes) could not be satisfied by nonphysical injury.[154]

### *F. Eighth Amendment*

The Judge has considered many Eighth Amendment cruel-and-unusual-punishment claims, generally favoring qualified immunity for prison officials. *Stewart* in 1999, one of the Judge's most cited opinions,[155] rejected a prisoner's claim that prison officials were deliberately indifferent to his medical needs, canvassing the factual history in great detail to show that no particular official knew and deliberately ignored the prisoner's medical condition.[156] *Baldwin* in 1998 rejected an excessive-force claim against officers who used mace pepper spray to quell

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[151] Bazan *ex rel.* Bazan v. Hidalgo County, 246 F.3d 481, 491-93 (5th Cir. 2001). Per Johnson v. Jones, 515 U.S. 304 (1995), the qualified-immunity interlocutory appeal considered only the materiality, not the genuineness, of fact disputes, and so the appeal was dismissed. *Bazan*, 246 F.3d at 493.

[152] Jackson v. City of Beaumont Police Dept., 958 F.2d 616, 621 (5th Cir. 1992).

[153] Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94, 98-99 (5th Cir. 1994).

[154] Dunn v. Denk, 54 F.3d 248, 253-57 (5th Cir. 1995) (Barksdale, J., dissenting), *rev'd*, 79 F.3d 401 (5th Cir. 1996) (en banc). While the result advocated in the Judge's dissent was vindicated by the en banc court, he disagreed with its approach in part. *See Dunn*, 79 F.3d at 403-04 (Barksdale, J., concurring in part and dissenting in part).

[155] *See* Lund, *supra* note 96, at 302 n.3.

[156] Stewart v. Murphy, 174 F.3d 530, 534-38 (5th Cir. 1999); *see also id.* at 538-42 (Politz, J., dissenting).

a disturbance on a bus without giving inmates an immediate opportunity to wash themselves.[157] *Newton* in 1998 rejected a duty-to-protect claim against officers who did not suspect that an inmate's risk of harm from another inmate was substantial.[158] Outside the qualified-immunity context, *O'Banion* in 1991 upheld money-reporting statutes,[159] *Davis* in 1997 held that an incompetent-to-be-executed claim could not satisfy successive-habeas-petition requirements,[160] and *Foster* in 2006 held that a driver for armed robbers displayed enough recklessness toward human life to receive the death penalty.[161]

### *G. Commerce Power*

Judge Barksdale has contributed one important opinion on the scope of federal power in environmental law, *GDF Realty Investments* in 2005, which found that the impact of different endangered species could be aggregated together in order to assess whether the effect on commerce was sufficient to justify their federal regulation under the Commerce Power.[162] However, even while he favored federal power to enact the Endangered Species Act, the Judge did not adopt as large a view of federal power as was possible in the case. He rejected the district court's rationale that because the ESA would block commerce in particular case—for instance, by blocking a Wal-Mart—the regulation fell under the Commerce Power.[163] He also rejected the notion that the contribution of particular local-to-Texas species to commerce might support their federal regulation.[164]

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157 Baldwin v. Stalder, 137 F.3d 836, 838-41 (5th Cir. 1998).
158 Newton v. Black, 133 F.3d 301, 308 (5th Cir. 1998).
159 United States v. O'Banion, 943 F.2d 1422, 1432-33 (5th Cir. 1991).
160 *In re* Davis, 121 F.3d 952 (5th Cir. 1997).
161 Foster v. Quarterman, 466 F.3d 359, 370-72 (5th Cir. 2006).
162 GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 638-41 (5th Cir. 2003).
163 *Id.* at 633-36.
164 *Id.* at 637-38.

## CONCLUSION

As Professor Lund has mentioned, judges do not select the cases the court hears or the panels on which they will sit. An individual judge's contribution to the law thus necessarily lacks a certain amount of narrative coherence. Nonetheless, Judge Barksdale's opinions convey the same unmistakable flavor of rigor, diligence, hard work, and devotion to protocol that his clerks have had the chance to observe in person. His personality as a boss and manager fit perfectly, I think, with my own need for restraint in the pursuit of academic tangents and rabbit trails. Like Professor Lund, I found his professionalism and enthusiasm for the work of the law contagious, and I loved both working for him and being part of the Barksdale family. It is impossible for printed words—whether in an opinion or a tribute—to do justice to the Judge's warmth and generosity, or the fondness and affection with which he will always be remembered, but it is a great honor to pay tribute to him.

# THE IMPORTANCE OF LAWYERS IN JUDGE BARKSDALE'S WRITINGS

*Andrew C.W. Lund**

## INTRODUCTION

It is my honor to contribute a piece to this wonderful collection commemorating Judge Barksdale's extraordinary career on the bench. It was truly a privilege to clerk for the Judge and it is no less so to have the opportunity to write a bit about his impact on the law.

My task is to give readers a sense of Judge Barksdale's jurisprudence since his arrival on the bench in 1990. Summarizing the Judge's written opinions is not easy. Judges on the U.S. Courts of Appeals do not get to choose the cases they are assigned or, in large part, the opinions they must write. Moreover, their opinions are significantly constrained by Supreme Court and circuit court precedent. Summaries of circuit court judges' written opinions tend to be a largely ad hoc collection of interesting decisions that may or may not tie together. Having read each of Judge Barksdale's published opinions, including dissents, a number of broad common strands emerge—respect for the law, judicial modesty, integrity and consistency over time and between contexts, honesty, clarity, and a keen analytical approach. Many of these have been aptly described by Chris Green in these pages.[1]

Along this line, I hope in this Article to develop a particular substantive lens through which an otherwise disparate set of his opinions might come into sharper focus. Specifically, I think it is useful to consider the heightened sensitivity to the role of lawyers in Judge Barksdale's jurisprudence. The Judge's writings consistently show that he is particularly invested in the view that attorneys ought to act with civility, integrity and

* Associate Professor of Law, Pace Law School. B.A., Swathmore College; J.D., New York University School of Law; law clerk to Judge Barksdale 2002-2003.

[1] *See* Christopher R. Green, *Some Themes from Judge Rhesa H. Barksdale's Published Opinions*, 79 MISS. L.J. 261 (2009).

competency. These expectations are grounded in the Judge's experience as a judge—his recognition of the "faith, trust and confidence"[2] that he must place in lawyers if he is to fulfill his duties. Judge Barksdale's writings thus (1) advocate for high professional standards, (2) reflect the central assumption that those standards are being met unless there is significant evidence to the contrary, and, (3) if such contrary evidence is shown, take their violation very seriously. The point is not that other judges do not do this, because surely all judges take lawyers—their role, their behavior, etc.—seriously. Rather, it is that Judge Barksdale's commitment to professionalism, broadly defined, plays an important role in his jurisprudence.

This lens, though hopefully useful, is of course not universally applicable across the Judge's opinions. Writing about any aspect of his opinions necessarily causes one to omit consideration of a number of the Judge's most important decisions that did not turn on the role of the attorneys.[3] Nevertheless, this imperfect interpretation is hopefully illuminating in at least one regard. Judge Barksdale's deep respect for the role of lawyers reflects his deep love and respect for the law itself. If law is to retain its "majesty"[4]—if its integrity is to be sustained and its application be honored—those who practice it must behave so as to deserve the majesty, their actions reflecting the same integrity and honor.

The link between lawyers' behavior and the law is clear to Judge Barksdale. To get a sense of its importance to him, one need go no further than "The Role of Civility in Appellate Advocacy," an article he contributed to a *South Carolina Law Review*

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[2] Rhesa H. Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 579 (1999) [hereinafter "The Role of Civility"].

[3] Judge Barksdale's opinions have been frequently cited by other courts and in secondary sources. Among his most "popular" opinions in terms of judicial citations are: Martin v. Cain, 246 F.3d 471 (5th Cir. 2001); Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001); Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996); Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995); and Macias v. Raul A. (Unknown) Badge No. 153, 23 F.3d 94 (5th Cir. 1994). Academics have most often cited: GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Canutillo Ind. Sch. Dist. v. Leija, 101 F.3d 393, (5th Cir. 1996); Ellison v. Software Spectrum, Inc., 85 F.3d 187, (5th Cir. 1996); and Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, (5th Cir. 1994).

[4] *See* The Role of Civility, *supra* note 2, at 580.

symposium on appellate advocacy generally. In it, the Judge makes a compelling case that lawyers who practice civilly—that is, thoughtfully and courteously[5]—are more effective than those who use, for instance, "scorched-earth" tactics.[6]

The Judge's point is not necessarily obvious given pop culture's preference for hard-nosed, antagonistic attorneys and the natural assumption that such tactics are necessary to achieve the best outcome for one's clients. Nevertheless, Judge Barksdale convincingly argues that incivility by appellate advocates (though the point can easily be extended to all forms of advocacy) is truly harmful to their clients' causes. Such incivility "diminishes respect for the law" and erects a roadblock toward the goal of reaching a "fair, prompt, efficient and relatively inexpensive resolution" to the matter at hand.[7] As a strategic matter, the incivility harms the client because "[t]he court cannot place faith, trust, or confidence in the [client's] lawyer."[8] More globally, if judges cannot place faith in lawyers, "there can be no appellate advocacy."[9] The article thus serves as practical advice for individual lawyers as well as a mission statement of sorts for appellate litigation: the entire project depends on certain standards being met by lawyers.

Judge Barksdale's article focused on civility, but civility is certainly not the only characteristic of lawyers key to functioning appellate courts. While there are certainly others, this Article raises two more aspects of lawyering that seem to hold a particularly elevated place in the Judge's jurisprudence: integrity and competency. A presumption of these three (including civility) norms pervades an eclectic subset of Judge Barksdale's opinions. From the obvious cases (attorney sanctions, ineffective assistance of counsel claims) to the less so (standing, the right against self-incrimination), many of the Judge's opinions hearken back to the foundational belief that lawyers are important, that their integrity, competency and civility are to be ex-

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[5] Judge Barksdale summed up the concept as "disagree[ing] without being disagreeable." *Id.* at 577 (citation omitted).

[6] *Id.* at 574.

[7] *Id.* at 577.

[8] *Id.* at 579.

[9] *Id.*

pected and that incursions on any of those expectations are to be met by a serious response.

*Attorney's Fees, Sanctions and Civility*

When lawyers fail to act civilly, Judge Barksdale does not stand idly by. Before reviewing some of his opinions on judicial sanctions for attorney misbehavior, it is worth noting that the Judge has expressed his deep concern for civility and professionalism in at least one other context—attorney's fee awards. In *Migis v. Pearle Vision, Inc.*, the Judge concurred in part and dissented in part from a decision that affirmed a $12,000 award for emotional distress in a Title VII employment discrimination case, remanding the case to the district court on the issue of the $81,000 fee award for plaintiff's counsel.[10] The Judge concurred with the decision to remand on these fees but stated that he would have gone further and given more guidance to the district court to significantly reduce the award.[11]

In the case, the plaintiff and her lawyer had entered into a contingency fee arrangement. During the pendency of the litigation, the plaintiff (presumably with advice from counsel) had rejected a settlement offer for an amount only slightly less than the $12,000 that she would ultimately win months later. From the case's inception through its conclusion, the plaintiff's lawyer had spent a significant number of hours on claims that ultimately failed. Finally, as described above, the lawyer's award was over six times the damages won by the plaintiff.

To the Judge, plaintiff's counsel's behavior reeked of incivility—of unreasonableness.[12] Prefacing his treatment of the issue, he noted:

> I fear that this [lodestar] procedure is being applied in keeping with the times, with the idea that nothing deserves something, and, especially in that regard, that lawyers must be handsomely rewarded, notwithstanding that their labors bore little,

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[10] 135 F.3d 1041, 1047-49 (5th Cir. 1998) (Barksdale, J., concurring in part and dissenting in part).

[11] *Id.* at 1050.

[12] *Id.* at 1049-66 (returning to the concepts of "reason" and "reasonableness" in relation to attorney's fees numerous times).

> if any, fruit . . . . Reason and reasonableness are missing in action. Excess has become an art form.[13]

In the opinion, he suggested that the district court consider the foregone settlement, the allocation of time spent on successful and unsuccessful claims and the relative paucity of plaintiff's recovery for purposes of arriving at a reasonable attorney's fee award.[14] This went further than the majority, which only remanded based on the disparity between the damages and fee.[15]

Judge Barksdale's opinion was not merely a determination that the lawyer in the particular case did not deserve to be rewarded as handsomely as he had been. It also reflected a call for the judiciary to actively raise the level of lawyers' behavior via close inspection of their actions before awarding fees. The system of incentives for attorneys produced inappropriate behavior —in this case the failure to accept a reasonable settlement offer and the waste of resources on unpromising theories. If the law needs lawyers to behave with civility, integrity and honesty, Judge Barksdale believed judges must work to recalibrate the fee incentives to encourage such behavior.[16] Looking solely to the result—the ratio between damages and fees—risked producing a lottery mentality among lawyers and its concomitant diminishment of the characteristics so valued by the Judge. More stringent scrutiny of the process actually undertaken by the lawyer—the settlements rejected and the theories improperly pursued—was necessary to stop the backsliding. While noting the importance of efficient judicial oversight of fee questions, Judge Barksdale concluded that his potentially more time-consuming approach is necessary given the principle at stake.[17]

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[13] *Id.* at 1050.

[14] *Id.* at 1056.

[15] *Id.* at 1048.

[16] *See id.* at 1065 ("We bemoan the too often seen lack of civility and professionalism and ethics, as well as the pursuit by some lawyers of, not excellence, but numbing mediocrity . . . . *Reason* and *reasonableness* can be restored; but, only when we are willing to do so.").

[17] *Id.* at 1056. ("Admittedly, and as noted, a request for attorney's fees should not result in a second major litigation. Nor do we require the district court's . . . analysis to be so excruciatingly explicit that decisions of fee awards consume more paper than did the cases from which they arose.") (internal quotation marks and citation omitted).

The most well-known example of the Judge responding to a lack of civility by a lawyer is his original dissent[18] and subsequent majority en banc opinion[19] in *Whitehead v. Food Max of Mississippi, Inc.* In *Whitehead*, after winning a verdict for his client against Kmart for the latter's failure to provide security in its parking lot, plaintiff's counsel obtained a writ of execution for the $3.4 million judgment.[20] Before executing the writ, the lawyer notified members of the media as to his plans and proceeded to enter the local Kmart and attempt to seize cash from the store's registers and vault. Despite only a three-day lapse between the denial of Kmart's motion for remittitur or a new trial and his entering the Kmart, the lawyer protested to the reporters present about Kmart's arrogance and failure to pay its debt.[21]

Kmart sought sanctions under Rule 11 of the Federal Rules of Civil Procedure. The district court granted the motion based, in part,[22] on plaintiff's counsel entering the Kmart in order to embarrass the company and self-promote. Counsel later explicitly confirmed these motives.[23] On appeal, a divided panel held that the lawyer's behavior was "patently inappropriate,"[24] but that, absent extraordinary circumstances, no improper purpose should be presumed under Rule 11 when the relevant documents—in this case, the writ—were otherwise legitimately filed.[25] Instead, the majority would leave it to other state authorities to handle the matter of counsel's incivility.[26]

Judge Barksdale dissented from the court's washing its hands of the matter. He noted that the facts at hand repre-

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[18] 277 F.3d 791, 797 (5th Cir. 2002) (Barksdale, J., dissenting).

[19] 332 F.3d 796 (5th Cir. 2002) (en banc).

[20] That judgment was eventually vacated. *See* Whitehead v. Food Max of Miss., Inc., 163 F.3d 265 (5th Cir. 1998).

[21] 277 F.3d at 797-98.

[22] The district court also held counsel had failed to reasonably inquire into the law regarding execution on judgments because an automatic 10-day stay was in effect when he entered the Kmart. The en banc opinion in Whitehead ultimately held that counsel had not made a reasonable inquiry, but held that the "improper purpose" ground for sanctions was sufficient in any event. *See* 332 F.3d at 804-05.

[23] *Id.* at 807.

[24] 277 F.3d at 796-97 (Barksdale, J., dissenting).

[25] *Id.* at 796.

[26] *Id.* at 797.

sented exactly the kind of "exceptional circumstances" the majority would require. When the purpose of obtaining the writ was as obviously improper as it was in the case, Rule 11 sanctions were appropriate. Consistent with the views he had expressed elsewhere, the Judge considered counsel's actions not merely an affront to Kmart, but also an attack on the judicial process and the rule of law. Because they are so important, the damage that lawyers can cause is all the greater. Courts have an obligation to supervise, through Rule 11 among other mechanisms, the behavior of lawyers who practice before them.[27] To the Judge, hoping for another entity to put a stop to atrocious behavior was not appropriate.

The Judge's view prevailed when the case was taken en banc. Writing the majority opinion upholding sanctions, Judge Barksdale conceded that civility and ethics rules are to generally be enforced by other bodies,[28] but he concluded that courts do have a clearly prescribed role to play—the one given to them by Rule 11—in enforcing some norms.[29] Against this view, Judge King dissented on the grounds that intent to embarrass and self-promote are too commonly found to constitute exceptional circumstances, given the potentially legitimate purpose in filing the writ.[30] On the one hand, Judge King's dissent stems from the potential chaos generated by allowing widely-observed, if unsavory, characteristics to form the basis of sanctions.

On the other, her disagreement seems to flow from a tolerant view of certain litigation behavior: "We, as appellate judges, operate at a far remove from the business of collecting judgments or effecting settlements. We ought to refrain from excoriating a lawyer based upon our own sensibilities . . . ."[31] Here, Judge King's criticism is not explicitly based on efficiency. Instead, it seems based on a degree of uncertainty about how strictly the norm of civility ought to be set regardless of the cost its enforcement would entail.

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[27] *Id.* at 797 (Barksdale, J., dissenting).
[28] 332 F.3d at 808.
[29] *Id.*
[30] *Id.* at 814 (King, J., dissenting).
[31] *Id.* at 815.

While sensitive to the inefficiencies created by requiring mini-trials on attorney behavior,[32] Judge Barksdale was much more certain of the need for high standards of behavior for lawyers. The reasons for this—the link he sees between attorney behavior and the legal system—has been discussed above. What the *Whitehead* opinions and Judge Barksdale's refusal to shrug off a lawyer's incivility proves is that he is willing to stand up for that connection. Against the cynicism that many of us feel about the civility, integrity, and competency of lawyers, the Judge refuses to "dumb down" his expectations for the bar.[33]

*Crediting Lawyers' Integrity*

This refusal to lower expectations has a secondary effect. Because the Judge expects so much from lawyers, he grants them a great deal of respect. This makes all the sense in the world because, after all, imposing high standards on lawyers is based on their importance to the overall project. Thus, the same theme leads to the judge regularly placing a great deal of faith in lawyers' competency and integrity.

In *Guidry v. Dretke*,[34] Judge Barksdale wrote the majority opinion for a divided panel upholding a district court's grant of habeas relief to Howard Guidry who had been convicted of murder for remuneration and sentenced to death by a Texas state court. The habeas claim was based on an alleged violation of Guidry's right against self-incrimination. For present purposes, the Judge's wide-ranging opinion is notable because of the weight it accorded to testimony by lawyers concerning statements made to them by the police officers.

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[32] *See supra* note 28 and accompanying text.

[33] For another example of the Judge taking on intemperate counsel, *see* Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994). In *Travelers*, defendants appealed a district court judge's refusal to recuse himself in their civil case when the judge belonged to social organizations in which colleagues of plaintiff's counsel and directors of the plaintiff were members. In addition to filing a motion filled with "intemperate (if not contemptuous)" allegations, defense counsel actually released a song attacking the integrity of the district court. *Id.* at 1408-09 & 1409 n.6. The Judge denied defendants' appeal on the merits and further held that the appeals were designed to harass and therefore sanctions appropriate. *See id.* at 1413.

[34] 397 F.3d 306 (5th Cir. 2005).

In March 1995, the officers had questioned Guidry, in jail at the time pending an unrelated bank robbery charge. During this questioning, Guidry confessed to participating in the murder for remuneration. The circumstances surrounding the confession were controversial. Guidry claimed that he had requested his attorney (retained for the robbery charge) prior to the interrogation and had been subsequently told by detectives that the attorney agreed that the questioning could continue outside of his presence. The detectives, on the other hand, claimed that Guidry had never asked for his lawyer and that they had never spoken to his robbery attorney.

Crucially, Guidry's attorneys for the murder trial stated (along with another attorney who had no connection with Guidry) that the same detectives told the attorneys that they (the detectives) *had* been given permission by Guidry's robbery attorney to question Guidry on the murder charge. Confronted with this testimony, the detectives asserted that they said no such thing to the murder-case attorneys. After conducting an evidentiary hearing, the state trial court denied Guidry's motion to suppress the confession, and Guidry was later convicted.

Guidry pursued state habeas relief and was denied. He filed a federal petition and requested an evidentiary proceeding regarding the involuntary confession issue. The district court agreed to do so, and subsequently granted the habeas petition. The state centered its appeal to the Fifth Circuit on dual claims that the district court (1) abused its discretion in holding an evidentiary hearing when such a hearing could only serve to rehash testimony from state court and (2) improperly substituted its credibility determinations for those of the state court after the evidentiary hearing.

Judge Barksdale wrote the opinion for the panel majority, upholding the district court's decision. On the evidentiary hearing issue, the opinion noted first that the district court had no way of knowing whether the witnesses' testimony would be the same during the second hearing. Moreover, the deference owed to state courts under AEDPA did not prevent the district court from testing the unreasonableness of the state court's factual

determinations through an evidentiary hearing.[35] Notably, the fact that *lawyers* had testified in state court seemed to matter greatly. The state court's implicit conclusion that the lawyers testified falsely was, to the majority, "too extraordinary to avoid development through an evidentiary hearing in district court."[36] That is, the presumption of lawyers' integrity warranted a closer look.

As to the district court's substantive determination, Judge Barksdale's opinion naturally focused on the four lawyers' testimony. The state court had discussed the conflicting testimony of Guidry and the detectives, but not that of the lawyers and the detectives. The opinion continued:

> The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, *where the witnesses are apparently credible*, brought into question whether [the decision was unreasonable]. After reviewing the demeanor of [the d]etectives ... while observing the credible testimony of the four lawyers and Guidry, the district court . . . was in an even better position not to accept the trial court's findings.[37]

The opinion does not say so, but one is left with the distinct impression that the witnesses' status as lawyers made them particularly credible. Such a determination would be entirely consistent with the Judge's more general commitment to promoting, expecting, and respecting excellence in lawyering.

*Crediting Lawyers' Competency – Ineffective Assistance Claims*

Along with a rebuttable presumption of lawyers' integrity, a rebuttable presumption of lawyers' competency runs through Judge Barksdale's opinions. The "rebuttable" qualifier is key—although the Judge might presume lawyerly competency as an initial matter, of course the facts of any case lead wherever they

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[35] In fact, Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts specifically contemplates the district court's discretion to hold an evidentiary hearing, subject to § 2254(e)(2)'s bar on evidentiary hearings to develop facts not presented by the petitioner in the state court. *See Guidry*, 397 F.3d at 323.

[36] *Id.* at 324.

[37] *Id.* at 327 (emphasis added).

do. Nevertheless, the presumption of reasonable and skillful behavior by lawyers is apparent.

Obviously, the question of lawyer competency often arises in the context of Sixth Amendment ineffective-assistance-of-counsel ("IAC") claims. In truth, Sixth Amendment opinions—especially habeas claims based on state convictions—are *not* likely to show very much about a judge's view of lawyerly competency. First, given the deference accorded to state habeas decisions under AEDPA[38] and the high burden required to prove deficient performance in any IAC analysis,[39] it is hard for judges to act in good faith and not have their opinions reflect the presumption of competency described this Article would attribute to Judge Barksdale. Moreover, because courts are able to omit a discussion of deficient performance and simply rely on there being no prejudice to the defendant under the test for IAC,[40] there are relatively few decisions that even tackle the issue of deficient performance *vel non* at all.

Nevertheless, it is unsurprising that Judge Barksdale recognizes the difficult and sensitive nature of defense counsel's work when conducting an IAC analysis. For instance, in *St. Aubin v. Quarterman*,[41] the Judge refused to find that defense counsel performed deficiently by not raising his client's mental-health history during the punishment stage of his murder trial. He concluded that the decision to avoid opening the door to prior bad acts associated with that history was likely the result of a thoughtful litigation strategy.[42]

While recognizing the discretion necessarily granted counsel over strategic matters, the Judge *is* willing to entertain defi-

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[38] 28 U.S.C. § 2254(d)(1)-(2) (2006) (review only to determine if state decisions were unreasonable application of facts or law).

[39] *See, e.g.*, Soffar v. Dretke, 368 F.3d 441, 471 (5th Cir. 2004) ("[J]udicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the first-part of *Strickland*'s test for IAC).

[40] *See, e.g.*, United States v. Fuller, 769 F.2d 1095, 1097 (5th Cir. 1985).

[41] 470 F.3d 1096, 1102-03 (5th Cir. 2006)

[42] *Id.* at 1103. See also United States v. Pierce, 959 F.2d 1297, 1301-04 (5th Cir. 1992), in which Judge Barksdale observed the competence of defense counsel where (1) the complained-of failure consisted only of the failure to raise Fourth Amendment issues for which his client had no standing and (2) counsel aggressively cross-examined prosecution witnesses.

cient performance claims in cases of simple negligence. In *Ladd v. Cockrell*, the defendant was convicted of capital murder and sentenced to death after a sentencing phase in which defense counsel put forth no mitigating evidence regarding the defendant's difficult childhood.[43] Judge Barksdale's opinion noted that defense counsel's failure to investigate further when the fact of a juvenile arrest was raised and no juvenile records had been provided to him *could* be deficient performance (when coupled with the failure to provide any mitigating evidence).[44]

*St. Aubin* and *Ladd* become easily reconcilable when one places them in the context of Judge Barksdale's commitment to lawyers. To the Judge, thoughtfully considering litigation options is the heart of a lawyer's job. Thus, he will not countenance second-guessing of those good faith decisions. However, negligence like the kind alleged in *Ladd* is to be rejected at all times. Avoiding using hindsight to evaluate strategic decisions while chiding attorneys for a failure of appropriate effort reflects the balance in the Judge's opinions between expectations of, and respect for, lawyers.

*Crediting Lawyers' Competency – Standing*

The view of lawyers as essentially competent unless demonstrated otherwise shows up elsewhere. For instance, in *Doe v. Tangipahoa Parish School Board*,[45] a father brought a claim against the local school district on the grounds that the school board's practice of praying before meetings violated the Establishment Clause. Judge Barksdale authored the majority opinion for the three-judge panel, concluding that the prayers fell outside any legislative prayer exception because they were uniformly Christian.[46]

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[43] 311 F.3d 349, 357 (5th Cir. 2002).

[44] *Id.* at 359. The opinion concluded that, in any event, the defendant was not prejudiced by the arguably deficient performance. *Id.* at 359-60. *See also* Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000) (prejudice not required to be presumed under law at time of conviction when defense counsel slept for unidentified segments of trial), *reh'g granted en banc, vacated by* 234 F.3d 1339 (5th Cir. 2000).

[45] 473 F.3d 188 (5th Cir. 2006), *reh'g granted en banc, vacated by* 478 F.3d 679 (5th Cir. 2006).

[46] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (establishing exception). Judge Barksdale's opinion assumed arguendo that *Marsh* could be applied to school board

In the father's original amended complaint, he asserted that he had attended school board meetings that began with prayer. In response, the board denied that assertion, but only for lack of information. Eventually, the sides agreed to a consent judgment leaving the Establishment Clause question as the only open issue. At that point, they also agreed to a set of stipulated facts, none of which specifically addressed the father's attendance at meetings or standing generally. The order regarding the stipulations, however, did note that the father and his sons would, if necessary, testify as to the facts alleged in the amended complaint.[47] At no point in the proceedings before the district court or the court of appeals did the board contest the father's standing or suggest that the father had not attended the board meetings.

In his panel opinion, the Judge dealt with the issue of standing *sua sponte*. He held that the board's failure to (1) challenge the father's assertion from the amended complaint or (2) contest standing more generally was an implied admission that the father had, in fact, attended a meeting: "[T]he [b]oard's decision to proceed on the merits of [the father's] claim, without challenging either that he attended [b]oard meetings or was offended by them, permits an inference that the [b]oard conceded these allegations in [the] complaint."[48]

Judge Barksdale's implied admission analysis in his panel opinion rested on a fundamental view of lawyerly competence. Standing cannot be waived,[49] but the facts supporting its existence can be conceded. The question is whether to take the board's silence in the face of the allegations in the amended complaint as a concession regarding the factual allegation of the father's attendance. This, in turn, depends largely on one's view of the board's lawyers. If the board's lawyers were competent,

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meetings. *But see* 473 F.3d at 205 (Stewart, J., dissenting) (contending that the *Marsh* exception did not apply to such meetings).

[47] *See* Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 510-11 (5th Cir. 2007) (en banc) (Benavides, J., dissenting).

[48] 473 F.3d at 195. Additionally, the opinion analogized to Rule 15(b) of the Federal Rules of Civil Procedure, which allows that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15(b); *see also* 473 F.3d at 195.

[49] 494 F.3d at 501 (Barksdale, J., dissenting).

their failure to challenge the complaint's allegations or the standing issue generally can be attributed meaning. Given an obviously important issue in their client's interest (the father's possible lack of standing) and an obviously adverse allegation in the complaint (that the father attended a meeting), a competent lawyer would raise his or her hand if there was something amiss. If, on the other hand, one is more skeptical of the lawyers' competence, their failure to fight on standing is of little probative value.

The issue was not discussed by either the concurrence or dissent in the original opinion. However, after a majority of the circuit's judges voted to rehear the decision en banc,[50] the standing question became the crux of the case. Chief Judge Jones, writing the majority opinion, refused to infer anything regarding the father's attendance from the board's failure to dispute the allegation in the amendment or the standing issue.[51] Where the stipulated facts omitted anything on that score the majority held that there was no reliable information to be gleaned from the board's lawyers' failure to contest standing or the factual allegations in the amended complaint.

In his dissent to the en banc opinion, Judge Barksdale recapitulated much of his analysis in the panel opinion. In particular, he highlighted the view of lawyer competency underpinning the implied-admission analysis: "Surely, had the [board] felt the [father] lacked standing, it would not have stipulated as it did, including . . . the four prayers that had been presented at [board] meetings . . . . Simply put, the [board] more than recognized its requisite adversarial position with the [plaintiffs]."[52] This conclusion was further supported, again assuming a certain level of lawyer competence, by the failure of the board to dispute the father's attendance on appeal before the en banc court.[53]

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[50] *See id.* at 496 (noting that the standing issue was raised by the en banc court *sua sponte* and subjected to supplemental briefing).

[51] *Id.* at 497. Chief Judge Jones also wrote that implying admissions regarding standing was impermissible in any event. *See id.* (citing Spencer v. Kemna, 523 U.S. 1, 10-11 (1998)).

[52] *Id.* at 508-09 (Barksdale J., dissenting).

[53] *Id.* at 507 (noting that the board did not address the standing issue until prompted by the court).

It would be folly to expect the themes discussed above to provide an interpretive key for the whole of Judge Barksdale's writings. But hopefully the recurring role that his view of lawyers plays in his opinions sheds a bit of light on his jurisprudence. Along this line, it demonstrates a bit more about what the Judge's opinions have meant for the law—they have served as a call to pay greater respect to, and expect more from, lawyers.

## CONCLUSION

For those of us fortunate enough to have been able to have one, a clerkship offers not just an inside view of the justice system but also an introduction to being a lawyer. Those of us who have had the privilege of clerking for Judge Barksdale received the most wonderful of such introductions imaginable. The Judge as a boss is brilliant, warm and funny. But so are others whom we have met and will meet during our careers after leaving his chambers. To me, what separates Judge Barksdale is the way he forced me to take my profession—and, by extension, myself—seriously.

The importance of this norm-setting cannot be overstated. At the beginning of my clerkship I would work diligently primarily because I did not want to let the Judge down. At some point during the year, I had internalized his ethic of professionalism so that I did those things because I understood that extreme diligence was the price of *being a lawyer*. This view is largely due to the standards the judge set, both implicitly and explicitly, for lawyers—himself, those of us who worked for him and the members of the bar that practiced before him. Those lessons are not always easily applied—they require us to maintain integrity when it may be advantageous to cut corners, to act competently when it would be easier to let things slide, to behave civilly when the alternative is appealing to say the least. But they are the necessary conclusions for anyone considering the role of lawyers in our society. Lawyers' integrity, competency, and civility are critical because lawyers are critical. Judge Barksdale's writings demonstrate his view that to believe otherwise is to make a serious error. His opinions offer those

who read them a chance to learn a few of the lessons that his clerks are lucky enough to have learned first-hand.

# ELECTRONIC DISCOVERY, INFORMATIONAL PRIVACY, FACEBOOK AND UTOPIAN CIVIL JUSTICE

*Rory Bahadur*[*]

## INTRODUCTION

This article initially examines the potential obliterating effect of electronic discovery rules, including recently enacted Federal Rule of Evidence 502(d)[1] and changing informational privacy paradigms on the adversarial model of civil justice. Initially, the article demonstrates that traditional paper discovery paradigms are a dynamic, party-driven equilibrium between the search for relevant truthful information and the recognition of private information contained within privacy zones contoured by the attorney-client privilege, the work product doctrine and ethical confidentiality rules.[2] Electronic discovery and electronically-stored information shifts this equilibrium heavily in favor of the search for the truth and minimizes the role of informational privacy in civil litigation.[3] In this regard, electronic discovery resembles the traditional, continental model of inquisitorial justice.[4]

The article next discusses how electronically-stored information "ESI" is driving the current massive privacy shifts in

[*] Associate Professor of Law Washburn University School of Law. I would like to thank the following individuals: Jim Concannon who was there when the seed for this article was planted and who constantly and generously contributed time and insight as the article became a finished product; Brad Borden, Ali Khan, Michael Schwartz and Bruce Carolan for agreeing to read and critique preliminary drafts of this article; Bill Rich for his input regarding the finished piece; Sheila Reynolds for her insight on the Model Rules of Professional Responsibility; Alex Glashausser for taking time to listen and critique even while he was on sabbatical; Tonya Kowalski for encouraging me to write the piece after I described my initial thoughts on it to her. I would also like to thank Jessica Garner, my research assistant for her incredible work on the piece. And finally, I would like to thank my wife Tracie and my family for supporting this time-consuming endeavor.

[1] Sept. 2008.

[2] *See infra* Part I.

[3] *See infra* Part II.

[4] *See infra* Part IV.A.

tort law and those associated with online social networking. These broader societal declines in informational privacy related to ESI parallel the decline observed in the electronic discovery paradigm,[5] and are directly attributable to the space-less nature of electronically-stored information, its ability to be rapidly disseminated and to changes in the nature of social morality.[6]

Finally, this shift in privacy facilitates implementing a justice system combining the best of both the European inquisitorial system and America's adversarial system. The hybrid system ensures the Continental search for material truth is not subjugated by the recognition of privacy as in the adversarial model but retains the laudable, libertarian, societal safeguards of the adversarial system.[7] This justice model decreases litigation costs, improves public perception of the civil justice system and increases the relevance and applicability of ethical rules.[8]

## I. THE ADVERSARIAL EQUILIBRIUM BETWEEN TRUTH AND PRIVACY

The adversarial system of justice is difficult to define.[9] However, its essential features include:

> [a] system for the consideration and resolution of legal disputes under which each side is entitled to have its nonfrivolous contentions considered by interests opposing them and . . . presented in relationship to the opposing contentions, with the assistance of competent counsel, after reasonable notice and opportunity to be heard, to an impartial judge or jury for fair consideration and final decision . . . all in a manner provided by law . . . commit[ted] to the immutable American expectation

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[5] *See infra* Part III.

[6] *See infra* Part III.C.

[7] *See infra* Part IV.C.

[8] *Id.*

[9] SEAN PATRICK SCALLY, PRESERVING THE ADVERSARIAL SYSTEM OF JUSTICE: CONTINENTAL CIVIL LAW AND THE ROLE OF THE AMERICAN LAWYER: A REASONED ARGUMENT EXTOLLING THE DIALECTICALLY-STRUCTURED SYSTEM OF ARGUMENTATION 1 (1986).

> that liberty will be ordered under law only after impartial judgment upon fair consideration of conflicting ideas.[10]

Summarily, the central precept of the adversarial system is "out of the sharp clash of proofs presented by adversaries in a highly-structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both parties and society. . . ."[11]

The goal of the adversarial system is not absolute truth, but "the 'truth' so far as it can be known, given the protection of the 'basic needs of the human personality, including privacy, autonomy, and freedom from humiliation and abuse.'"[12] The Federal Rules of Civil Procedure reflect the adversarial system's sacrifice of ultimate truth for resolution. Rule 1 does not state truth is the objective of our civil system of justice, but instead the rules "secure the just, speedy, and inexpensive determination of every action and proceeding."[13] The rule was worded as such to formally acknowledge that fair resolution was not the only aim of the rules, but one that must be balanced against the equally important goals of resolving litigation without undue cost and delay.[14]

Discovery or "the principal fact-gathering mechanism in the formal civil litigation process"[15] is an integral part of the adversarial system of civil justice[16] and is "one of the most significant innovations of the Federal Rules of Civil Procedure."[17] The proc-

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[10] *Id.* (quoting A. Sherman Christensen, *Some Reflections on the Nature and Future of the Adversary System*, 30 DEF. L.J. 325, 329 (1981)).

[11] *Id.* at 2 (quoting STEPHAN LANDSMAN, THE ADVERSARY SYSTEM, A DESCRIPTION AND DEFENSE (1984)).

[12] *Id.* at 2 (quoting WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 27 (1985)).

[13] FED. R. CIV. P. 1.

[14] FED. R. CIV. P. 1 (1993 amendments).

[15] Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV 479, 482 (1995).

[16] STEPHAN LANDSMAN, ABA SECTION OF LITIGATION READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 4 (1988) (noting that a major assumption of the adversarial system is fairness and equality of the contest and "the primary mechanism for ensuring this equality is pretrial discovery").

[17] Hickman v. Taylor, 329 U.S. 495, 500 (1947); *see also* LANDSMAN, *supra* note 16, at 482-83 (describing discovery as "where most pre-trial disputes are played out and

ess is fundamental in federal notice pleading as the basis for development of a party's factual contentions.[18] The benefits envisioned by the discovery procedures are tempered in practice by the realities of the adversarial system which typically "resulted in bitter, protracted and expensive squabbles over whether or not parties had complied with various discovery requests, and sometimes these disputes completely eclipsed the merits of the action."[19]

Even without the inherently adversarial nature of the process, this squabbling is not surprising because the rules include some obviously competing principles; recognition of inaccessible, private information zones and the unearthing of information necessary for the resolution of the dispute.[20]

Initially the scope of discovery is broad, "[p]arties may obtain discovery regarding any *nonprivileged* matter that is *relevant* to any party's claim or defense," and the court may broaden the scope to permit "discovery of any matter relevant to the subject matter involved in the action."[21] This broad definition of discovery includes two unquantifiable terms, privilege and relevance, which result in an infinite maze of judicial opinions.[22] Providing a check on the breadth of the discovery process and discussed below are three doctrines defining spheres of private

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where many cases are effectively won or lost. The principle behind discovery is simple: mutual knowledge of all the relevant facts of a dispute leads to its fair resolution. If the parties, the court and the trier of fact have access to all the relevant facts of a dispute, its outcome at trial will more likely be fair. Moreover, early access to all potential evidence often leads to early settlement. Early settlement avoids costly trials. The primary means to achieve full access to the facts is discovery.").

[18] Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Conley v. Gibson, 355 U.S. 41, 47-48 (1957); *see also* LANDSMAN, *supra* note 16, at 483 (confirming that "[t]he modern rules of discovery evolved to release the adjudicatory process from the English common law system of writs and formalistic pleadings in which hyper-technical formulas rather than merit or fairness decided cases. Under the common law system, pre-trial disputes focused on the wording of the pleadings rather than on the facts of the case.").

[19] JAMES MOORE & KEVIN SHIREY, MOORE'S RULES PAMPHLET 432 (2009).

[20] *See infra* Part I.A-D.

[21] FED. R. CIV. P. 26(b)(1) (emphasis added).

[22] A Westlaw search reveals there are thousands of federal cases containing the word privilege and/or relevance. *See also* case law surrounding FED. R. EVID. 403.

information not accessible by the opposing party, even if they contain dispositive information.

### *A. The Private Information Protected by the Work Product Doctrine*

The work product doctrine is embodied in the federal discovery rules and, though not precisely a privilege, it will be treated as such for the purposes of this paper because in the context of the discovery process it represents and defines a zone of privacy where, absent exceptional circumstances, access to the information and search for the truth are unjustified. "[T]he purpose of the [work product] rule is to protect a zone of privacy for strategizing about the conduct of the litigation itself . . . ."[23] It is a tiered doctrine recognizing two distinct levels of privacy, one qualified and the other absolute. The contours of the qualified privacy zone created are such that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent),"[24] unless the party requesting the information shows it has substantial need for the information to prepare its case and cannot do so without undue hardship.[25]

Absolute protection is given to information considered so private it may not be disclosed to the opposing party no matter how relevant or necessary the information otherwise may be. This absolute protection recognizes that "disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" should never be disclosed.[26]

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[23] Testwuide v. United States, 2006 WL 5625760, 8 (Fed. Cl. 2006) (quoting Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)).

[24] FED. R. CIV. P. 26(b)(3)(A).

[25] FED. R. CIV. P. 26(b)(3)(A)(ii).

[26] FED. R. CIV. P. 26(b)(3)(B). Also related to the work product rule is a similar zone of privacy surrounding the information held by non-testifying experts in civil trials. Rule 26(b)(4)(B) states, "A party may not . . . discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial," except in "exceptional circumstances." FED. R. CIV. P. 26(b)(4)(B). Even if the

### *B. The Private Information Protected by the Attorney-Client Privilege*

Another example of an inaccessible privacy zone recognized in discovery is attorney-client privilege. "The modern public purpose underlying [the attorney-client] privilege is to encourage full disclosure without fear that the information [given to the attorney by the client] will be revealed to others, so that clients receive the best and most competent legal advice and representation."[27] Information protected by the attorney-client privilege is private so a client can rest assured that communications the client makes to the attorney will be confidential and disclosure cannot be compelled in the action regardless if it would otherwise be discoverable as relevant or even dispositive to the action.[28]

### *C. The Private Information Protected by the Rules of Ethics*

Model Rule of Professional Conduct 1.6 prohibits an attorney from "reveal[ing] information relating to the representation of a client"[29] and therefore also establishes an informational privacy zone. The attorney may only reveal otherwise private information when the client provides informed consent or in the case of certain other limited exceptions not relevant to this article.[30] Recognition of this zone of privacy created by the Model

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exceptional circumstances exist the adversarial system demands that the party seeking the information from the expert pay both a fee to the expert and pay the opposing party part of the fee it incurred in initially obtaining the expert information. FED. R. CIV. P. 26(b)(4)(C)(i-ii).

[27] *See* 81 AM. JUR. 2D *Witnesses* § 326 (2004) ("The main purpose behind the attorney-client privilege is to promote freedom of consultation of legal advisers by clients. More specifically, the root purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients without fear that confidential information will be disclosed to others so that fully informed legal advice may be obtained and, thereby, promote broader public interests in the observance of the law. Protecting confidential communications between an attorney and a client not only facilitates the full development of facts essential to proper representation of a client but also encourages the general public to seek early legal assistance.").

[28] *See* Evergreen Trading, LLC *ex rel.* Nussdorf, 80 Fed. Cl. 122, 133 (2007) ("The purpose of the attorney-client privilege is to guarantee confidentiality between attorney and client. . . .").

[29] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004).

[30] MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2004).

Rules of Professional Conduct is fundamental to the adversarial justice system.[31]

The attorney-client privilege and work product protection are closely related to ethical confidentiality[32] and, like the ethical confidentiality rule, the informational privacy zones they create are so fundamental to adversarial justice that the Rules of Civil Procedure directly address the method by which challenges to the contours of these zones are made. [33]

These zones of private information are areas to which the goal of truth seeking must yield. It is a recognition that certain private information which, even if dispositive for resolution of the issue at hand, is unattainable by the parties to the dispute. As a result, litigation in the adversarial system represents a balance between discerning material truth and protecting "basic needs of the human personality, including privacy, autonomy and freedom from humiliation and abuse."[34]

### *D. The Mechanics of Accommodating Private Information and Truth*

Up until the electronic discovery rules were adopted in 2006, the competing principles of truth seeking and privacy were accommodated by well-defined procedures and motion practice contoured by Rules 26 and 37, which tested the boundaries of what information the opposing party should have access to and that which it could not because the information was private. According to the rules, when a party elects not to produce an otherwise discoverable document claiming it is private (either work product protected or privileged) they must "(i)

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[31] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2004) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively . . . .").

[32] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (explaining, "The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege [and] the work product doctrine. . . .").

[33] FED. R. CIV. P. 26(b)(5)(A).

[34] SCALLY, *supra* note 9, at 2.

expressly make the claim; and (ii) describe the nature of the [materials] not produced or disclosed . . . in a manner that, without revealing [the actual privileged or protected material], will enable other parties to assess the claim [of privacy]."[35]

The reason for expressly making the claim and allowing the requesting party to assess the claim is to enable the requesting party to challenge the claim via a motion to compel discovery.[36] The adversarial nature of the process is once again highlighted by Rule 37's requirement that the losing party in the challenge must pay the prevailing party's expenses "incurred in making the motion, including attorney's fees."[37]

If traditional civil discovery is a forum where the tension between the core elements of the adversarial system, the search for material truth, and the recognition of private information protection, are in a dynamic, party-driven equilibrium, then electronic discovery shifts this equilibrium heavily in favor of the search for material truth.

## II. ELECTRONIC DISCOVERY'S EQUILIBRIUM SHIFT

### *A. Structural Differences of Electronic Discovery*

Electronic discovery or e-discovery refers to the discovery of ESI.[38] ESI is "information created, manipulated, communicated, stored and best utilized in digital form, requiring the use of computer hardware and software."[39] Electronic discovery is extensively covered and developed in many papers and presentations, and a detailed treatment of the differences related to the discovery of paper documents and electronically-stored information is beyond the scope of this piece. However, this brief description of the challenges unique to electronic discovery dem-

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[35] FED. R. CIV. P. 26(b)(5)(A).

[36] FED. R. CIV. P. 37(a)(3)(B).

[37] FED. R. CIV. P. 37(a)(5)(A)-(B).

[38] Wikipedia, *Electronic Discovery*, *available at* http://en.wikipedia.org/wiki/Electronic_discovery (last visited Mar. 4, 2009).

[39] Kenneth J. Withers, *Electronically Stored information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 173 (2006), *available at* http://www.law.northwestern.edu/journals/njtip/v4/n2/3 (last visited Mar. 3, 2009).

onstrates that current adversarial paradigms of discovery are ill equipped to deal with electronically-stored information.

Some of the major distinguishing features of electronically-stored information include volume and privilege screening.[40]

### 1. Volume

This is perhaps the most significant aspect of electronically-stored information.[41] To put things in perspective:

> The average personal computer hard drive today can easily store 60 gigabytes of data—or 60 stacks of paper 85 feet tall—and large organizations' computer networks commonly store information in terabytes, each equivalent to 500 million typewritten pages. All this information can be subject to discovery. Members of the bar and public have complained that producing this information in discovery has become increasingly time-consuming, burdensome and expensive.[42]

One of the biggest reasons for the increase in volume is electronically-stored information involves more replication than paper information.[43] Additionally, computers have become the primary means of communicating, effectively replacing the telephone, mail, face-to-face meetings and inter personal conversa-

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[40] *Id.* at 173-85.

[41] *Id.*

[42] *Electronically Stored Information Target of New Rules*, NEWSL. OF THE FED. CTS. THE THIRD BRANCH, Nov. 2006, *available at* http://www.uscourts.gov/ttb/11-06/electronically/index.html (last visited Mar. 3, 2009).

[43] Withers, *supra* note 39, at 174 (explaining, "The primary cause of the tremendous volume of electronically stored information is that computer systems seldom "move" digital information from one place to another, in the same physical sense that paper media is moved from a desk to a file cabinet, mailbox, or warehouse. Instead, electronically stored information is replicated on media in various physical locations. "Sending" an email message, for example, initiates an electronic process by which a pattern of positively and negatively charged electrons on one computer hard drive is replicated on several other computer hard drives, perhaps around the world, until it reaches the destination hard drive and is rendered as an image on the recipient's screen. It is also likely to be replicated on several locations on both the sender's and recipient's hard drive, as well as on network email servers and their backup media. One message becomes several, a process repeated billions of times daily.").

tions.[44] Each time we use a computer-based communication, mode replication, as previously described, occurs.[45]

Furthermore, hitting the delete key on a computer keyboard does not delete the information in the true sense of the word but merely rearranges it on the computer's storage medium.[46]

### 2. Privilege Review Costs

Privilege screening or preproduction screening refers to a lawyer's obligation to screen the information provided to an opposing party before responding to a request for production so as to ensure that the information designated as private or undiscoverable by the ethical rules, attorney-client privilege or work product doctrine is not divulged to the opposing party, resulting in a waiver of the privilege.[47]

It fast became apparent in electronic discovery that the cost of producing the data for the producing party could be prohibitive and the typical rule of each party bears its own discovery costs was deemed unfair.[48] As a result, the case law developed tests to facilitate cost-shifting as a means of remedying the problem of unique prohibitive cost to the producing party in

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[44] *Id.*

[45] *Id.*

[46] *Id.* (pointing out, "By now, all computer users should be aware that the action of "deleting" an electronic file does little more than change the name and eliminate reference to it in the operating system's list of active files, a situation aptly described by computer forensics expert Joan Feldman as a "witness protection program for bad documents." Not only can the deleted file be easily recovered, but the action of pressing the "delete" key does nothing for the dozens, scores, or hundreds of replicants existing elsewhere on the system, on the network, or on backup media. This fact . . . also frustrates well-intentioned efforts to effectively dispose of outdated, superseded, or surplus electronically stored information.").

[47] *See, e.g.*, Harper v. Brinke, 2007 WL 2509646 (E.D. Tenn. 2007) (discussing waiver of confidential material by disclosure of that material to third parties).

[48] Withers, *supra* note 39, at 182 (explaining, "The cost of copying and transporting electronically stored information is virtually nil. The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion. Organizations without state-of-the art electronic information management program[s] in place, which classify information and routinely cull outdated or duplicative data, face enormous (often self-inflicted) costs and burdens. Commentators posited that savvy requesting parties could force settlement of cases simply by threatening electronic discovery.").

electronic discovery.[49] For example in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[50] a federal district court articulated the following eight factors to decide which party should bear the cost of production of electronic discovery:

> The specificity of the discovery request; the likelihood of discovering material data; the availability of those data from other sources; the purposes for which the responding party maintains those data; the relative benefits to the parties of obtaining those data; the total costs associated with production; the relative ability and incentive for each party to control its own costs; and the resources available to each party.[51]

Similarly, another seven factor test for cost allocation was adopted by the district court in *Zubulake v. UBS Warburg LLC*:[52]

> The extent to which the request is specifically tailored to discover relevant information; [t]he availability of such information from other sources; [t]he total cost of production, compared to the amount in controversy; [t]he total cost of production, compared to the resources available to each party; [t]he relative ability of each party to control costs and its incentive to do so; [t]he importance of the issues at stake in the litigation; and [t]he relative benefits to the parties of obtaining the information.

The exponentially increased cost of privilege screening in electronic discovery is directly related to the volume and the nature of ESI.[53] In order to effectively engage in pre-production privilege review:

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[49] *Id.* at 182-83.

[50] 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

[51] *Id.*; *see also* Withers, *supra* note 39, at 11 (reiterating the importance of the *Rowe* factors).

[52] 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

[53] Withers, *supra* note 39, at 185 (explaining, "Email is informal in nature and tends to be circulated widely, creating many copies and versions [sic] of the same message with different senders and recipients. In addition, email messages tend to be strung together in 'threads,' making it difficult to parse out the privileged messages from the non-privileged ones. Perhaps the most significant contributor to the cost of privilege screening, however, is fear. In many jurisdictions, the inadvertent production of a document over which a privilege objection should have been raised serves to waive that privilege as applied to that document, or possibly over that category of documents or then subject matter of the document. Even if the jurisdiction in which the litigation is taking

> Broad database searches may be necessary, requiring safeguards against exposing confidential or irrelevant data to the opponent's scrutiny. A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. [54]

In fact, recent estimates suggest preproduction privilege review now makes up seventy-five percent of the cost of electronic discovery.[55]

The following statistics serve to further highlight the unique challenges of dealing with the discovery and associated preproduction privilege review of electronically-stored information. As of 2003, "ninety-two percent of new information is stored on magnetic media, primarily hard disks."[56] Furthermore, American workers send about twenty-five billion email messages per day.[57]

Under pressure from scholarly publications, think tanks in the field, and practitioners, proposed a series of amendments to the Federal Rules of Civil Procedure to deal with the challenges of electronic discovery.[58] The amendments became law on December 1, 2006, and resulted in changes to Federal Rules of

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place does not recognize this 'privilege waiver' doctrine, there is fear that the inadvertent production of a privileged document in one litigation may serve as a waiver in other jurisdictions in which the party has litigation. This uncertainty results in extremely cautious behavior on the part of counsel, which drives costs up.").

[54] Laura Catherine Daniel, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 665 (2005).

[55] DANIEL J. CAPRA ET AL., LIMITATIONS ON PRIVILEGE WAIVER UNDER NEW FEDERAL RULE OF EVIDENCE 502 (Sedona Conference Voices from the Desert Series CD-ROM, rel. 25, Nov. 2008) [hereinafter *Sedona Conference*].

[56] PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003, *available at* http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (last visited Jan. 20, 2010).

[57] Daniel, *supra* note 54, at 664.

[58] *Id.* at 663-71.

Civil Procedure 16, 26, 33, 34, 37 and 45.[59] Of these, the changes to Rule 26 and the advisory committee notes regarding privilege waiver are most relevant to this paper.

*B. The Electronic Discovery Rules Regarding Privilege Waiver*

The 2006 advisory committee notes to Federal Rules of Civil Procedure 26 encourage the use of two devices to reduce the preproduction-privilege-review costs in electronic discovery, and the clawback and quick-peek agreements.[60] A quick-peek agreement works as follows: "[t]he requesting party is allowed to see his opponent's entire data set before production. The requester identifies relevant information from his opponent's mass of information. The producing party then extracts privileged information from the now smaller set and turns over his responsive documents and a privilege log."[61]

A clawback agreement is based on the following premise from the advisory committee notes:

> [P]roduction without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. . . . In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation materials.[62]

Stated another way:

> In a clawback arrangement, both parties to a dispute agree in writing that inadvertent production of privileged materials will not automatically constitute a waiver of privilege. If the producing party realizes the disclosure in a reasonable time, he can request the document's return, or "claw it back," and the other party must comply. The requesting party is pre-

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[59] Amendments to the Federal Rules of Civil Procedure (2006), *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Jan. 17, 2010); *see also* FED. R. CIV. P. 16, 26, 33, 34, 37, 45 advisory committee's notes (2006).

[60] *See* FED. R. CIV. P. 26 advisory committee's notes (2006).

[61] Daniel, *supra* note 54, at 667.

[62] *See* FED. R. CIV. P. 26(f) advisory committee's notes (2006).

> sumptively barred from using the privileged document to further his client's case.[63]

The advisory committee notes to Rule 26 encourage the use of quick-peek and clawback agreements, but the substantive law regarding whether or not disclosure pursuant to these agreements constitutes waiver cannot be modified by the Rules of Civil Procedure since the Rules Enabling Act forbids the rules from abridging enlarging or modifying any substantive right.[64]

The case law is also clear that Rule 26(b)(5) only presents a procedural mechanism for resolving disputes about whether privilege was waived through disclosure in electronic discovery and does not provide the substantive law which applies to the resolution of whether or not waiver occurred via disclosure.[65] Apart from the substance/procedure distinction above, there is controversy as to "whether the Federal Rules of Civil Procedure are an appropriate vehicle for addressing this issue [of privilege], and even if they are deemed to be appropriate, how far civil procedure rules can go to solve a problem that involves aspects of common law, evidence doctrine, and legal ethics."[66]

The civil procedure rules on electronic discovery do not countenance wholesale abandonment of any preproduction

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[63] Daniel, *supra* note 54, at 666-67.

[64] 28 U.S.C. § 2072(b) (1992) ("Such rules shall not abridge, enlarge or modify any substantive right.").

[65] Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 233 (D. Md. 2005) ("The proposed amendment does not address the substantive questions whether privilege or work product protection has been waived or forfeited [by the procedures in the proposed amendment to Rule 26(b)(5) ]. Instead, the amendment sets up a procedure to allow the responding party to assert a claim of privilege or of work-product protection after production . . . . It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders . . . [Proposed] Rule 26(b)(5)(2) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information." (quoting *Report to the Standing Committee on Rules of Practice and Procedure, Judicial Conf. of the U. S. by the Advisory Comm. on the Fed. Rules of Civil Procedure,* Sept. 2005 at 26)). *See also* FED. R. CIV. P. 26(b)(5) advisory committee's note (2006).

[66] Daniel, *supra* note 54, at 673 (quoting KENNETH J. WITHERS, TWO TIERS AND A SAFE HARBOR: THE ELECTRONIC DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 3 (Aug. 25, 2004) (unpublished manuscript), *available at* http://www.krollontrack.com/publications/twotiers.pdf (last visited Jan. 17, 2010).

privilege review, but rather address only inadvertent disclosure.[67] What the rules facilitate is an attorney still conducting a preproduction privilege review to prevent private information from being disclosed. This is balanced against the reality that in the era of vast information stored information will be inadvertently disclosed.[68] However, the Federal Rules of Civil Procedure are not the only rules drafted to facilitate electronic discovery.

In an attempt to further encourage attorneys to engage in quick-peek and clawback agreements, Federal Rule of Evidence 502, specifically 502(d), was promulgated and became law in September 2008.[69] The Senate debate and passage of this rule unequivocally indicates Rule 502(d) was specifically designed to reduce the cost of preproduction-privilege review and is considered the most important and innovative part of the rule.[70]

The rule goes further to encourage the use of clawback and quick-peeks than the amendments to the Federal Rules of Civil Procedure because:

> Rule 502(d) is not limited to *inadvertent* disclosure. It protects against waiver by disclosure of any type, whether inadvertent or intentional. It thus permits a party to open its files to an adversary; allows the adversary to decide what information it considers relevant and wants to use; and permits the disclosing party to assert privilege thereafter [(or not to do so)—as in the quick-peek approach to electronic discovery]. [71]

Each side benefits from reduced costs under the 502(d) regime because under a 502(d) agreement rather than examining its entire database and then the opposing party's entire data-

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[67] FED. R. CIV. P. 26(b)(5) advisory committee's note (2000) (explaining, "The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues").

[68] *See supra* Part II.A.2.

[69] Dean Gonsowski, *The E-Discovery Plot Thickens with the Passing of FRE 502*, INSIDE COUNSEL, Jan. 26, 2009, *available at* http://www.insidecounsel.com/Issues/2009/January-2009/Pages/The-EDiscovery-Plot-Thickens-with-the-Passing-of-FRE-502.aspx (last visited Jan. 20, 2010).

[70] *Sedona Conference*, *supra* note 55, at 18:40-19:42.

[71] Gregory P. Joseph, *Impact of 502(d) on Protective Orders,* NAT'L L.J., Nov. 17, 2008 (emphasis added).

base, each party examines only the adversary's entire database. If the 502(d) type agreement was not entered into, each party would have to do two entire database searches. The first search would be of its own storage medium to remove all private information, and the second would be of their opponent's storage medium after their opponent had located and redacted private information.

Instead, under the type of agreement facilitated by 502(d), each party would only be responsible for a search of one entire storage medium: its opponent's. The party would be responsible for deciding which of the requested data on its own storage medium is subject to a privacy claim only after the other side identified and made a specific request for data they identified as relevant to discovery. So instead of searching two entire storage media, the party would search only its opponent's entire storage medium and be responsible only for reviewing a subset of its own stored information, comprised solely of documents identified by the adversary as relevant. As to this smaller data set identified by the adversary, the party need only decide which are privileged and which are not.

To further illustrate, two corporations with huge computer storage systems are opposing parties in a federal suit. Both parties agree to grant full access to their database to the opposing side. The parties get their own computer experts to go through the opposing party's data, and then the searching party identifies documents on its opponent's storage medium it wants to acquire. The producing side either could agree to produce the document or, pursuant to a 502(d) agreement, claim it is private and therefore undiscoverable.[72]

By enacting Federal Rule of Evidence 502(d), Congress is strongly encouraging the use of quick-peek and clawback agreements in litigation, allowing the court to mandate entry into these agreements even over the objection of the parties.[73] For example, the court may enter a 502(d) confidentiality order *sua sponte* in order to minimize the risk in cases where a party's preproduction privilege review burden is disproportionately

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[72] *See supra* Part II.B-C (explaining the use of quick-peek agreements).

[73] *Sedona Conference*, *supra* note 55 at 20:45-21:02.

lower than the opposing party's, and failure to enter into an agreement would be an advantage to the party with the lower burden.[74] Additionally, suggestive of 502(d)'s larger impact than the Federal Rules of Civil Procedure on the electronic discovery landscape is Congress' more direct and substantial involvement in enacting evidence rules which affect evidentiary privileges than in enacting procedural rules.[75]

The rule even states that the agreed upon terms of non-waiver, despite disclosure, is not a waiver of the privilege in any other federal or state proceeding.[76] As a result, arguments abound that Rule 502(d) may not be constitutional because it potentially infringes upon the states' substantive common law regarding waiver of privilege through disclosure.[77] While the rules clearly reduce the preproduction cost associated with electronic discovery, the new rules represent a litigation sea change, shifting the previously described equilibrium between privacy and discovery of truth heavily in favor of discovery of truth.

### *C. Altering the Balance between Privacy and Truth: The Cat Leaves the Bag*

The innovation countenanced by 502(d) permits the party to make the privilege or protection claim even after the opposing party identifies the information.[78] In other words, under a 502(d) agreement, if the information requested and already in the hands of the opposing party is subsequently deemed to be

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[74] *Sedona Conference*, *supra* note 55 at 20:45-21:02.

[75] *Compare* 28 U.S.C. § 2074(a) (1992) (indicating that if Congress does not object to the procedural rules suggested by the Judicial Conference and Supreme Court they automatically become law on December 1 of the year they were submitted to Congress) *with* 28 U.S.C. § 2074(b) (1992) (requiring an affirmative act by Congress to adopt an evidentiary rule such as 502(d) which affects an evidentiary privilege).

[76] *See* FED R. EVID. R. 502(d).

[77] *See* Julie Cohen, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 655-63 (2008). *See also* FED. R. EVID. 502(f) (stating that the rule applies even where state law forms the rule of decision).

[78] 154 CONG. REC. S1317, S1318 (Feb. 27, 2008) (explaining that "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.").

privileged or protected, it cannot be entered into evidence because 502(d)'s protection of privilege applies even to information intentionally disclosed during preproduction-privilege review.[79]

In protecting the attorney-client privilege or work product protection regarding information already disclosed pursuant to a 502(d) agreement, the rule ensures such information cannot be entered into evidence.[80] Despite the maintenance of the privilege and inadmissibility into evidence, it is important to note that introduction into evidence is not necessarily the most harmful effect of disclosing information because:

> A litigation adversary can "use" the document containing your privileged or protected communication in many ways that give you no opportunity to object. For example, the adversary may formulate questions or trial strategies that are based on or informed by privileged or protected documents. In that event, objecting may be either impossible or pointless. Similarly, if the adversary has fact or expert witnesses review and rely on privileged or protected documents (of course, before the claims are asserted and sustained), it will be impossible to have those witnesses "unlearn" that information and difficult to excise the resulting knowledge from their testimony or opinions.[81]

So in effect the label of privilege or work product is simply a useless moniker because the essence of the privilege, or the private area to which the adversary traditionally did not have ac-

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[79] *Sedona Conference*, *supra* note 55, at 20:45-21:02.

[80] *See* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. J. 853 n.1 (1998) (explaining that attorney-client privilege material "cannot be disclosed at any future time, nor can it be given in evidence in another suit, although the client, from whom the communication came, is no party and has no interest in it.") (quoting People v. Adam, 280 N.E.2d 205, 207 (Ill. 1972)).

[81] Jim Beck & Mark Herrmann, *New Federal Rule of Evidence 502 – A Modest Improvement?*, DRUG & DEVICE LAW, Sep. 23, 2008, *available at* http://druganddevicelaw.blogspot.com/2008/09/new-federal-rule-of-evidence-502-modest.html (last visited Jan. 5, 2010); *see also* Daniel, *supra* note 54, at 682 (explaining that "it is virtually impossible for the receiving lawyer in such an arrangement to erase from memory the privileged material that he has glimpsed. A clawback or quick-peek, despite all its protective clauses, simply cannot guarantee . . . against strategic use of the privileged information by opposing counsel in the case covered by the agreement"); *see also Sedona Conference*, *supra* note 55, at 39:15-40:35 (explaining that it does not take a "particularly clever adversary" to craft discovery requests to get at the factual matter contained in a statement which is attorney-client privileged.).

cess, no longer exists. Of course factual information conveyed in a communication to the attorney was never itself privileged. For example, a client would not have to answer the question, "What did you tell your attorney about person X's involvement in the alleged scheme to defraud?" but person X could be properly asked in deposition what his role was in the scheme to defraud.[82]

The key distinction is that, before the advent of electronically-stored information this type of information was in a definable, finite space and quite likely located in a physical box or file, which was identifiable. This identifiable physical space containing the privileged information could be tightly guarded and not produced to the adversary in discovery. The adversary, although free to ask, would probably not even be clued in to X's involvement in the scheme since under a paper discovery model it would not be privy to the communication between the client and the counsel.

However, in the age of electronic discovery, if that communication is made by email and even if that email is subsequently deleted, it simply shifts to a different position on a data-storage medium. Under the privilege review procedure encouraged by 502(d) and expressly supported by 26(b)'s advisory language regarding the use of quick-peek agreements, the existence of that email, whether ultimately admissible into evidence or not, is knowable by the opponent who is given the entire data collection to observe.[83]

An element of the privilege and work product doctrines essential to the functioning of our adversarial system of justice is privacy.[84] The purpose of this privacy is to ensure public faith in

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[82] Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (explaining, "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831(E.D. Penn. 1962)).

[83] *See supra* Part II.B. (discussing the use of quick-peek and clawback agreements).

[84] *See* Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes,* 43 WAKE FOREST L. REV. 979, 1031 n.212 (2008) (explaining that "In recognizing the work-product doctrine, the Supreme Court noted the need for a lawyer to "work

the functioning of the adversarial system, and also to ensure that our civil system of justice remains true to its primary goal, which is resolution often at the expense of the truth.[85] The electronic discovery protocols therefore represent a decline in informational privacy and hence a change in the structure of the adversarial system of justice. The use of computers and ESI is also obliterating informational privacy on a broader societal level. An examination of the decline in informational privacy in tort law and due to the phenomenon of online social networking is illustrative.[86]

## III. ESI'S ROLE IN DECREASING TORT PRIVACY AND THE VOLUNTARY RELINQUISHMENT OF INFORMATIONAL PRIVACY

### *A. The Decline of Informational Privacy in Tort*

The concept of privacy in tort is recent and its development occurred only in the twentieth century.[87] The development of the law of privacy is tied to an 1890 Harvard Law Review article written by Samuel D. Warren and Louis D. Brandeis.[88] Informational privacy is defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[89]

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with a certain degree of privacy." As with attorney-client privilege, the Court adopted a partly instrumental justification for protecting attorney work product. The court noted the importance of competent legal representation to society as a whole and expressed concern that counsel would decline to record work product in an effort to conceal it from his adversary in the absence any protection from disclosure, resulting in inefficiency and less competent representation."); *see also* Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1151-52 (2007) (confirming that "[The confidentiality principle] creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens;" additionally, when lawyers keep client information confidential, they "demonstrate the moral values of trust and loyalty."); Lucas T. Charleston, In re Cardinal Health, Inc. *Securities Litigation*, 53 N.Y. L. SCH. L. REV. 167 n.1 (2008/2009) (further explaining that "[t]he work-product doctrine . . . is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries").

[85] *See infra* Part IV.A.

[86] *See infra* Part III.

[87] DAN B. DOBBS, THE LAW OF TORTS 1197 (2000).

[88] *Id.*

[89] A.F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

To this end, tort law recognizes the tort of public disclosure of private facts.[90] "[T]he elements of the public disclosure of private facts tort [are] . . . (1) public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern."[91]

The existence of this informational privacy-based tort is in jeopardy and this jeopardy has exponentially increased because of ESI's expansion of the newsworthiness doctrine. Even before the impact of ESI the constitutionality of the tort was questioned and a few jurisdictions rejected the tort completely.[92] Where the tort was rejected, it was largely because the tort requires the information revealed to be information which is not of public concern or, in other words, information that is not newsworthy, even before the popularity of the computer, was interpreted inexactly and broadly.[93]

The following pre-ESI language from the Supreme Court in *Florida Star* defines newsworthy information as any truthful information that is published or disseminated by the media and seems to question whether liability is at all possible for this type of publication. "Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, **if at all**, only when narrowly tailored to a state inter-

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[90] Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007).

[91] *Id.*

[92] See, for example, *Hall v. Post*, wherein North Carolina rejects this tort as being unconstitutional:

> [A] cause of action predicated on public disclosure of private facts depends for its success on the truthfulness of the published material. The Supreme Court of the United States has specifically recognized that "it is here that claims of privacy *most directly confront* the constitutional freedoms of speech and press. Thus, it is obvious here . . . that the branch of the invasion of privacy tort which the plaintiffs seek to have us adopt is constitutionally suspect and, even if it ultimately manages to survive constitutional review, would tend to add to the tension already existing between the First Amendment and the law of torts . . . . Accordingly, we reject the notion of a claim for relief for invasion of privacy by public disclosure of true but "private" facts.

372 S.E.2d 711, 716-17 (N.C. 1998).

[93] *Id.* at 714 (using the terms newsworthy, of public interest, and of legitimate public concern interchangeably); *see also* Florida Star v. B.J.F., 491 U.S. 524, 553 (1989) (explaining in the dissenting opinion that "[t]he trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish").

est of the highest order." [94] In *Bartnicki v. Vopper*,[95] the Supreme Court arguably went further and extended the First Amendment based, newsworthiness defense to publication "disclos[ing] the contents of an illegally intercepted communication."[96]

The scholarship is also unhelpful in providing a meaningful, limiting, definition of newsworthiness.[97] The Restatement (Second) of Torts reluctantly admits newsworthiness is defined

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[94] *Id.* at 541 (emphasis added).

[95] 532 U.S. 514 (2001).

[96] Bartnicki v. Vopper, 532 U.S. 514, 517 (2001); *see also* VICTOR E. SCHWARTZ ET AL., PROSSER WADE AND SCHWARTZ'S: TORTS CASES AND MATERIALS 971(11th ed. 2005) ("In [this case] defendant's broadcast plaintiffs' taped cell phone conversations that had been intercepted and recorded by an unknown person in violation of federal and state law. The tape had been left with Vopper, a radio talk show host who, knowing of their illegal source, later broadcast the tapes, revealing plaintiffs' telephone numbers together with private information about the teachers' union tactics in a labor dispute . . . . The Court held that illegally intercepted phone calls later broadcast by others were protected by the First Amendment . . . . [While] the majority determined the legal garnering of the tape was critical . . . the Court's opinion puts much emphasis on the newsworthiness of the information weighing that against diminished privacy interests.").

[97] See, for example, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009), proposing a test which determines newsworthiness according to public figure status or "Voluntary Ascension to Position of Public Notoriety." The problem with this test is that it, like other California Courts, confuses the public figure defense to defamation with the concept of newsworthiness. For example, in *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), the district court applied California law using this as a factor in the test for newsworthiness); Ariella Goldstein, *Privacy from Photography: Is There a Right Not to Be Photographed Under New York State Law?*, 26 CARDOZO ARTS & ENT. L.J. 233, 247 (2008) (referring to Prosser's concept of newsworthiness, "the public [has the right] to know what is going on in the world. . . . [and] all events and items of information which are out of the ordinary humdrum routine," and realizing the limitless nature of the exception to the tort by accepting newsworthy information as synonymous with "other matters of public interest"); Jeff Dendy, *Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 167 (1997) (citing RESTATEMENT (SECOND) OF TORTS § 652D (Special Note 1977) (curiously advocating for the Restatement's meaningless standard to determine what is newsworthy when the Restatement itself notes the tort is constitutionally suspect and "[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment."). The Restatement's definition of what is newsworthy is also problematic, diffuse, and provides no basis for a useful definition of newsworthiness. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmts. g-h (struggling to define the meaning of "newsworthiness").

by those who publish and broadcast the news.[98] News is also defined broadly and is "not 'limited to the dissemination of . . . current events'; rather, it 'extends also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general.'"[99]

Before ESI, in 1977, at the time of the Restatement's comment, news was information provided by a discrete set of media corporations.[100] Today however, with the advent of the computer and internet communications, the term "those who publish and broadcast the news" refers to anyone with a personal computer and internet access. For example, reports of the February 25, 2009 crash and pictures of the wreckage of a Turkish Airliner on approach to an airport in Amsterdam were first published not by one of the mainstream media corporations but by the online social networking site, Twitter.[101] Other examples abound of

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[98] *Id.* special note, cmt. g ("To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term [newsworthiness], as a glance at any morning paper will confirm.").

[99] Ariella Goldstein, *Privacy from Photography: Is There a Right Not to Be Photographed Under New York State Law?* 26 CARDOZO ARTS & ENT. L.J. 233, 247 (2008) (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 413 (1960)).

[100] *See Cable and the Decline of the Big Three*, Encyclopedia.com, *available at* http://www.encyclopedia.com/doc/1G2-3468303143.html (last visited Jan. 20, 2010) (revealing that "Before the 1980s the 'Big Three' networks—ABC, CBS, and NBC—were practically television's sole providers of national news and sporting events, major Hollywood releases (which were edited for content), and original dramatic series.").

[101] Claudine Beaumont, *Amsterdam Plane Crash: Twitter Social Media and the Anatomy of a Disaster*, TELEGRAPH, *available at* http://www.telegraph.co.uk/scienceandtechnology/technology/twitter/4806238/Amsterdam-plane-crash-Twitter-social-media-and-the-anatomy-of-a-disaster.html (last visited Mar. 3, 2008).

> The playing out of major events in the world of blogs and social media is becoming an ever more familiar tale. Today's plane crash just outside Schiphol Airport in Amsterdam broke first on Twitter, the popular microblogging service. Jonathan Nip, who lived near the scene of the accident, was one of the first to tweet about the crash. "Looking at a crashed aeroplane near Schiphol," he wrote, just moments after the plane came down. "A lot of emergency services rushing to the scene," he updated, a few minutes later. "Still no more info. Can't find any info on the net."
>
> It's the last part of that tweet that's interesting, because it underlines the shifting dynamic of breaking news. Here was an eyewitness to an event who was able to broadcast the latest information far quicker than traditional broadcasters could. The internet, which Jonathan Nip usually relies on for

online social networking sites disseminating information or news traditionally disseminated by large news corporations.[102]

ESI's impact on newsworthiness is clear as the internet surpasses or is rapidly surpassing traditional media as the source of news.[103] One of the reasons the internet is becoming the primary source of news is a demographic shift described by the BBC as follows:

> The challenge for big media players like the BBC is to stay relevant to young men and women reared on a diet of MP3s and iPods.
>
> This is a generation for whom media means MySpace, Flickr, YouTube or any of the other new web services.
>
> . . . .
>
> The popularity of sites that bring together various news sources, like Google News, is a sign of how the relationship between the news provider and consumer is changing.
>
> The time when people accepted without question a newspaper's or broadcaster's view of the world is on the way out.
>
> It is being replaced by a universe in which readers can compare and contrast information, where trust has to be earned.

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news and facts, was being outpaced by his own direct experiences, which he in turn was sharing with the world via the medium of Twitter.

*Id.*

[102] *See id.* (explaining that social networking was involved in disseminating news about "last year's earthquakes in China, . . . the Mumbai terrorist attacks, and [the] aircraft [that] crashed-landed in the Hudson river. Twitter [also] helped many people caught up in the Australian bush fires to find a path through the flames . . . .").

[103] *See* Pew Research Center for the People & the Press, *Internet Overtakes Newspapers as News Outlet*, Dec. 23, 2008, *available at* http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source (last visited Sept. 13, 2009) (indicating that fifty-nine percent of Americans under thirty now get their news from the internet); *see also* Alex Mindlin, *Web Passes Papers as News Source*, N.Y. TIMES, Jan. 4, 2009, *available at* http://www.nytimes.com/2009/01/05/business/media/05drill.html?_r=2 (last visited Jan. 5, 2010) (revealing that the percentage of people who used the internet as their primary news source doubled from 2008-09).

> This trend is strongest among young, well-educated professionals who value their ability to shape the news to meet their needs and interests.
>
> The danger for mainstream media outlets is that they risk becoming increasingly marginalised by a generation *who want the news they want, when they want and in whatever shape they want.*[104]

This shift to ESI-based news sources renders obsolete, the Restatement's assertion that mainstream media defines what news is and leads to a vast expansion of what the meaning of news and hence newsworthiness is. News has now become whatever a person wants to see and not necessarily what a media giant determines is appropriate.[105] "The Framers of the First Amendment surely did not foresee the advances in science that"[106] would give rise to this expansive definition of news and hence newsworthiness.

If news is now an unstructured, amorphous term describing whatever information people desire access to, then a comparison of the top internet searches of 2008 provides a basis for what news really is. The top internet searches for 2008 on the search engine Yahoo are as follows from most popular to least popular:

1. Britney Spears
2. WWE
3. Barack Obama
4. Miley Cyrus
5. RuneScape

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[104] Alfred, Hermida, *Young Challenge Mainstream Media*, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/technology/4962794.stm (last visited Sept. 2, 2009) (emphasis added).

[105] *Id.* Of course what keeps traditional media outlets afloat is advertising revenue and advertisers surely would want to place their product on the media networks providing the information most people want. In essence then, the internet has also changed the nature of news distributed by the traditional media corporations in that successful media corporations need to have audience appeal and numbers which they could then use to lure potential advertisers. Many news organizations such as CNN, for example, cater to the changing nature of news with user-generated news sites such as ireport.com, which consists of stories submitted by users which are not "edited, fact checked or screened before they post." http://www.ireport.com/about.jspa (follow "FAQ" hyperlink; then follow "How is this section different from the rest of CNN.com?" hyperlink).

[106] Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

6. Jessica Alba
7. Naruto
8. Lindsay Lohan
9. Angelina Jolie
10. American Idol[107]

The list accurately demonstrates the change in the nature of news and newsworthiness because 2008 was a presidential election year and yet Brittney Spears and the World Wrestling Entertainment bested our current President.[108]

Perhaps the Pulitzer Center on Crisis Reporting's YouTube presentation best illustrates the impossibility of defining news and hence newsworthiness in the era of ESI.[109] As part of an effort to determine what news is, the Pulitzer Center on Crisis Reporting asked journalists what they thought news was, and the responses varied widely from a more modern conception of news as, "anything that's interesting,"[110] to a more patriarchal, traditional view defining news as "what people want to know and what people need to know."[111] However, what people want to know may differ from what people need to know, and it is the media's job to make that connection clear for the public.[112]

We were faced with two choices in determining the scope of the newsworthiness exception to privacy. One, allowing judges to decide what is newsworthy, is likely undemocratic and elitist.[113] Or we can say newsworthiness is whatever the public is

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[107] Yahoo.com, Top 10 Searches for 2008, *available at* http://buzz.yahoo.com/yearinreview2008/ (last visited Jan. 5, 2010).

[108] *Id.* It should also be noted that "Britney" topped 2008 despite the fact this was a full two years after she took the internet by storm after being photographed drunk and sans underwear, sitting on the hood of a car. *See* Film.com, *Britney Spears' Naked Crotch has Lost its Magic*, Oct. 12, 2007, *available at* http://www.film.com/features/story/britney-spears-naked-crotch-has/16862548 (last visited Jan. 5, 2010) (noting that the photographs in question were viewed over 100,000 times per day on the internet).

[109] Pulitzer Center on Crisis Reporting, *What is News?*, *available at* http://www.youtube.com/watch?v=2U8Okb16okE (last visited Jan. 5, 2010).

[110] *Id.* (interview with Ellen Lee of the San Francisco Chronicle).

[111] *Id.* (interview with Antigone Barton of the Palm Beach Post).

[112] *Id.*

[113] *See e.g.*, Hall v. Post, 372 S.E.2d 711 (N.C. 1998) (demonstrating Justice Mitchell's view that, "the chilling effect is minimized if the question of whether the published material is of legitimate concern to the public is initially a question of law for the trial court."). However, the elitist nature of Justice Mitchell's view is exposed by Judge

interested in finding out about,[114] thereby implying that all information is potentially newsworthy under the common law.[115] The top searches on Yahoo and the statistics on internet usage indicate that we have chosen the latter.[116]

As a result, electronically-stored information and the associated exponential expansion of the newsworthiness privilege has at least necessitated or fostered a severe diminution of privacy in tort law. This decreased expectation in informational privacy is also illustrated by a very modern phenomenon, the voluntary relinquishment of informational privacy.

### *B. The Voluntary Relinquishment of Informational Privacy*

"I just had a weird thought. Before Facebook and Twitter, people actually kept their personal lives to themselves."[117] The quote illustrates that ESI and the internet permit the phenomenon of online social networking, which represents an unprecedented, broad societal demise in the concept of informa-

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Baime's comments in *Yun v. Ford, Motor Co.*, who disagreed with a finding of proximate cause as a matter of law in a negligence case:

> We judges are strange creatures. It is not that we are less brave than others, but rather by reason of our training, if not our nature, we tend to the conservative. For most of us, prudence and caution are the watchwords. We are rarely rewarded for taking risks. But the rest of the population does not always act the way we do. What may appear strange to judges might seem rather ordinary to others. It thus generally makes sense to have lay people, not judges, make decisions on the question of proximate cause, grounded as that concept is in considerations of foreseeability and fairness.

647 A.2d 841, 851 (1994) (Baime, J., concurring and dissenting).
At this juncture it seems as though a jury would be in a better position than a judge to determine newsworthiness. However, by the time the case gets to the jury the information we wished to keep private would have been disseminated in the interim.

[115] Once information is on the net, and enough people are interested in viewing the information, it is newsworthy and hence no longer private under the common law. Note I say under the common law because certain statutes, such as the Health Insurance Portability and Accountability Act (HIPAA), mandate privacy and nondisclosure. One might violate HIPAA, which regulates the dissemination of medical records and other personal health information, and possibly not violate the common law if the information is that a Boy Scout leader has received therapy for child molestation.

[116] *See infra* notes 100, 103.

[117] George Sfarnas, *A Boy and His Blog*, BEING FIVE COMIC STRIP, *available at* http://www.prunejuicecomics.com/beingfive/strips09/twitter.gif (last visited Mar. 3, 2008).

tional privacy. Brad Paisley's song, *Online*,[118] captures perfectly the societal relevance of online social networking sites (OSN's). Professor Patricia Sánchez Abril explains that:

> [Online social networking] usually refers to websites whose main purpose is to act as a connector between users. The primary species of this cyber-genus is websites that facilitate communication via user-generated Web profiles that can include personal information, music, pictures, links, video clips, real-time transcripts of conversations, and often-colorful self-musings. . . .
>
> For OSN participants, a web page or online profile constitutes their identity in cyberspace. Anyone with a valid e-mail address can create a profile. . . .
>
> . . . .
>
> . . . .What results is a digital combination of a billboard and a scrapbook; a résumé and a diary; a tabloid magazine and a family photo album; and a reality television show and a family video all rolled into one. As one commentator has described it:
>
> > If you can imagine having a club, a social club, where everybody walked around with a big sandwich board on the front of them saying everything about themselves, if you take that concept and take it to the Internet, something that's happening electronically across the world, not just in

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[118]

> I work down at the pizza pit And I drive an old Hyundai
> I still live with my mom and dad I'm 5'3 and overweight
> I'm a Sci-Fi fanatic Mild asthmatic Never been to 2nd base
> But there's a whole nother me That you need to see Go check out MySpace
> 'cause online I'm out in Hollywood I'm 6'5 and I look damn good
> I drive a Maserati I'm a black belt in Karate And I love a good glass of wine
> It turns girls on that I'm mysterious I tell 'em I don't want nothing serious
> 'cause even on a slow day I can have a three way Chat with two women at one time
> I'm so much cooler online So much cooler online

Brad Paisley, Online

> one little building, that's kind of what social networking does right now on the Internet. [119]

There are well over a hundred OSN sites considered major sites,[120] not including defunct sites. The two most popular sites in the United States are MySpace[121] and Facebook.[122] MySpace was founded in August 2003 and is now the third most visited website in the United States, the sixth most visited in the world, and an integral part of popular culture.[123] "By mid-2005, within two years of MySpace's debut as a social-networking site . . . MySpace was getting more page views than Google, and by early 2006, MySpace was welcoming around 200,000 new members a day."[124] As of February 16, 2009, MySpace claims about 130 million users worldwide.[125]

Similarly, Facebook defines itself as "a social utility that connects people with friends and others who work, study and live around them. People use Facebook to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet."[126] It is now the largest online social network and worth approximately $3.7 bil-

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[119] *See* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 13-16 (2007).; *see also* Dana M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. OF COMPUTER-MEDIATED COMMC'N (2007), *available at* http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (last visited Mar. 3, 2009) (defining social network sites as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.").

[120] Wikipedia, List of Social Networking Sites, *available at* http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Sept. 13, 2009).

[121] MySpace Home Page, http://www.myspace.com.

[122] Facebook Home Page, http://www.facebook.com.

[123] Pedro de Gouveia, *The Four Most Popular Social Networking Sites*, BIZ COMMUNITY, *available at* http://www.bizcommunity.com/Article/196/16/20623.html (last visited Sept. 13, 2009).

[124] LARRY MAGID & ANNE COLLIER, MYSPACE UNRAVELED 11 (2007). More recent estimates put the figure as high as 230,000 new members per day. *See* Sánchez Abril, *supra* note 119, at 13.

[125] *Seeing Opportunity, Myspace Flexes Mobile Muscles*, ABC NEWS/TECHNOLOGY, *available at* http://abcnews.go.com/Technology/wireStory?id=6893939 (last visited Jan. 5, 2010).

[126] Pedro de Gouveia, *The Four Most Popular Social Networking Sites*, BIZCOMMUNITY.com, *available at* http://www.bizcommunity.com/Article/196/16/20623.html (last visited Jan. 5, 2010).

lion.[127] As of February 2009, Facebook had 175 million users and was growing at the astounding rate of 5 million new users per week.[128] Additionally, 18-24 year-old users, the original intended audience of the site, now make up less than 25% of users as more "mature" people begin to engage in social networking.[129] Online social networking is not merely a modern recreational, social activity but it is important for the modern identity exploration "happening all over the world."[130]

The typical OSN profile or page may contain information about the user's marital status, sexual orientation, hometown, religion, smoking habits, drinking habits, children, education, income, interests, music, movies, television, books, and other information, including photos of the user and friends and family[131] or other information traditionally considered private.[132] Unlike the Brad Paisley song referenced above, people involved in online social networking are revealing real and considerable personal or private information about themselves and not merely fictitious information.[133] For example, half of all blogs[134] discuss relationships such as boyfriends or girlfriends and peo-

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[127] *Facebook Appraisal Pegs Company's Value at $3.7B*, ABC NEWS/TECHNOLOGY, *available at* http://abcnews.go.com/Technology/wireStory?id=6859162 (last visited Jan. 5, 2010).

[128] Jessi Hempel, *How Facebook is Taking Over Our Lives,* CNNMoney.com, *available at* http://money.cnn.com/2009/02/16/technology/hempel_facebook.fortune/index.htm?postversion=2009021910 (last visited Jan. 5, 2010).

[129] *Id.*

[130] MAGID & COLLIER, *supra* note 124, at 11, 16.

[131] *Id.* at 36-56; *see also* Sánchez Abril, *supra* note 119, at 5 (explaining the nature of the disclosures occurring via the web: "OSNs such as MySpace and Facebook host billions of interactions a day and facilitate the dissemination of personal information via combinations of audio, video, and text. Uninhibited users of these social technologies, sometimes referred to as digital natives or the MySpace generation, routinely post online titillating videos and photographs, disclose their personal information (and that of others), and document their daily lives and thoughts.").

[132] *Id.* at 16 (describing the content of OSN profiles or blogs as containing sordid details of personal lives).

[133] David Huffaker, *Teen Blogs Exposed: The Private Lives of Teens Made Public*, *available at* http://www.davehuffaker.com/papers/Huffaker-2006-AAAS-Teen_Blogs.pdf at 4 (last visited Jan. 5, 2010).

[134] "A blog (a contraction of the term 'web log') is a website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video." Wikipedia, *Blog*, *available at* http://en.wikipedia.org/wiki/Blogs (last visited Mar. 4, 2008).

ple who the blogger has a crush on.[135] Sometimes the blogger displayed information about whom the blogger "hook[ed] up" or "ma[de] out with" and even included discussions of sexual experiences.[136]

The internet is currently transitioning from a system of prearranged websites "to a second generation platform of social networking sites, communication tools, and web applications" or Web 2.0,[137] which is here to stay and we have little control over it.[138] Web 2.0 actually encourages the disclosure of private information which people are not otherwise comfortable giving out via other methods of communication. For example, bloggers often discuss their homosexuality, sometimes using the Web to "come out" even where immediate associates were not privy to the information.[139] There simply is no "real world parallel" or precedent for this type of disclosure. [140] As one researcher put it, traditionally, "You don't go walking around the mall telling people whether you are straight or gay."[141]

A recent study of 4000 Carnegie Mellon University college students revealed the following astonishing statistics regarding their Facebook profiles:

> 90.8% of profiles contain an image, 87.8% of users reveal their birth date, 39.9% list a phone number (including 28.8% of profiles that contain a cellphone number), and 50.8% list their current residence. The majority of users also disclose their dating preferences (male or female), current relationship status (single, married, or in a relationship), political views (from "very liberal" to "very conservative"), and various interests (including music, books, and movies). A large percentage of users (62.9%) that list a relationship status other than single even

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135 Huffaker, *supra* note 133, at 7.

136 *Id.*

137 Web Terminology Glossary, *Web 2.0*, *available at* http://back40design.com/glossary/?letter=W (last visited Jan. 5, 2010).

138 MAGID & COLLIER, *supra* note 124, at 172 (indicating "Web 2.0 is not going away anytime soon, and it's hardly something we can control.").

139 Huffaker, *supra* note 133, at 7.

140 Alison George, *Living Online: The End of Privacy?*, NEW SCIENTIST TECH, *available at* http://www.newscientist.com/article/mg19125691.700-living-online-the-end-of-privacy.html (last visited Jan. 5, 2010).

141 *Id.*

> identify their partner by name and/or link to their Facebook profile.[142]

This comfort with disclosing what was formerly considered private information is a result of ESI and the "media environment they've grown up in."[143] This environment leads to the belief that the more information people provide to their online profiles the more valuable the network becomes to them.[144] Furthermore, the fact that people are publishing unprecedented volumes of information online, that may be permanently accessible by web users, is changing the nature of personal privacy and even putting an end to the concept.[145] In fact, as people become more comfortable putting their personal information online, a shift in what we consider private could also occur.[146]

A recent Pew study indicates "51% of under 30, home broadband users have posted content to the internet, compared with 36% of home high speed users older than 30."[147] The transition to Web 2.0 and the associated voluntary relinquishment of privacy as a result of online social networking is sure to increase as the internet becomes accessible not only from homes but from mobile devices with broadband capability.[148]

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[142] Ralph Gross & Allesandro Acquisiti, *Information Revelation and Privacy in Online Social Networks* 9, WORKSHOP ON PRIVACY IN THE ELECTRONIC SOCIETY (2005), *available at* http://privacy.cs.cmu.edu/dataprivacy/projects/facebook/facebook1.pdf (last visited Jan. 5, 2010).

[143] MAGID & COLLIER, *supra* note 124, at 22.

> Consider the amazing time we live in. Paris Hilton is famous because she's famous. . . . The idols of "American Idol" are instantly famous, and the show's ratings suggest that everybody else should want to be famous, too. . . There are plenty more reality TV shows that are all about exposing the intimate details of people's lives-including "real" celebrities. . . Kids are getting all these messages saying, "expose, expose, expose . . . . If you don't your friends will expose you. . . . We're all living in a superpublic environment, getting the message that you have more power if you expose yourself than if someone exposes you.

*Id.*

[144] George, *supra* note 140; *see also* Alexandro Dileonardo, *CMU Researches Facebook Privacy as Site Goes Global,* THE TARTAN, *available at* http://www.thetartan.org/2006/9/18/news/facebook_research (last visited Jan. 5, 2010).

[145] George, *supra* note 140.

[146] *Id.*

[147] MAGID & COLLIER, *supra* note 124, at 172.

[148] *Id.* at 11-12.

### *C. Possible Reasons for Informational Privacy's Normative Shift*

#### 1. Spatial Challenges of ESI

Research suggests changes in attitudes towards privacy of electronically-stored information and information in cyberspace relate to the conception that this information is somehow massive, untraceable, and unquantifiable.[149] Another possible reason is the world of electronically-stored information and cyberspace seems somehow artificial or unknown and unnamed,[150] such that there is a flawed assumption that cyber disclosure of private information cannot impact the "real" world.

Other hypotheses about changes in attitudes towards privacy are further reaching but provide a means to utilize the privacy paradigm shift to improve our civil justice system. The first of these theories relates to electronically-stored information's spatial indefiniteness.[151] This directly relates to the changes in electronic discovery, especially in the area of preproduction-privilege review because as previously mentioned, before the incorporation of the computer and electronically-stored information, paper information was stored in a discrete space or, in the case of an attorney, in a discrete filing system with individual labels.[152]

An attorney knew exactly where the file labeled "privileged" was in her office, and in response to a request for production, she would not send the specific box of documents containing privileged information, which was located in a discrete, physical space.[153] Part of the reason the information could be considered private is because it was stored or located in a discrete and tangible physical space which the attorney could identify and to which the attorney could prevent access.[154] In other words, for information to be private, a person has to have physical control

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[149] Huffaker, *supra* note 133, at 10 ("the sheer size of the internet may produce a feeling of safety or anonymity" in the same way people often say it is easier to tell a stranger private information than an "acquaintance, family member or friend.").

[150] *Id.*

[151] *See, e.g.*, Sánchez Abril, *supra* note 119, at 17-21.

[152] *See infra* Part II.C. (describing document management in a paper world).

[153] *Id.*

[154] *Id.*

and awareness of the space where the information resides. Access to that known space could then be denied.

Today electronic information is not similarly stored in a discrete and tangible physical space in the same sense as physical or paper-based information, but it is stored on a hard disk in a manner unrelated to our traditional concepts of physical space.[155] Today's attorney is simply unaware of the physical location of information sought in an electronic discovery request. It is likely stored, duplicated, and rearranged every time the magnetic storage medium containing it is accessed or retrieved.[156]

Without this awareness of spatial location, the attorney has two choices: turn over no information or turn over all. Civil litigation and the discovery process prohibit the former but now actively encourage the latter.[157] Under traditional privacy conceptions, a person simply cannot claim a privacy right in information, the location of which they are unaware and therefore are unable to hide.

### 2. Flexible Morality

The second theory regarding ESI's impact on the decline in informational privacy relates to ESI's facilitation of both the dissemination of formerly private information and the disclosure of information traditionally considered private[158] and to privacy's historic use as a way to shield one's reputation from moral or ethical judgment.[159] As these ethical "norms" have shifted or been destroyed, the need to use privacy as a defense of

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[155] *See e.g.*, Sánchez Abril, *supra* note 119, at 17-21; *see also* Withers, *supra* note 39, at 8, 10-11 (discussing the unique custodianship issues of ESI as well as the difference in sorting paper discovery and electronic discovery).

[156] *See supra* Part II.A. (describing the mechanics of electronically-stored information).

[157] *See supra* Part II.B. (discussing the new rules electronic discovery paradigm favoring the sharing of information).

[158] *See supra* Part III.A. (demonstrating that the ease of dissemination of ESI is the basis for the expanding scope of the newsworthiness privilege); *see also* MAGID & COLLIER, *supra* note 124, at 22 (discussing incentives for people to share via the internet, information traditionally considered private).

[159] *See* Boyd, *supra* note 119.

one's reputation has decreased, and therefore more "typically private" information is revealed.

People often use privacy to defend their reputation from judgment and to control how they are viewed.[160] Judge Posner notes, "Privacy allows people to 'conceal information about themselves that others might use to their disadvantage'" or that causes them to be embarrassed.[161] Dr. Alfred Kinsey first hinted at this in his study of sexual behavior wherein he concluded that the prevalence of what was considered deviant sexual behavior was so widespread that it in fact was the norm, and what was considered normal was really a fictional picture humanity painted of itself to avoid social embarrassment.[162]

Today, highly esteemed public figures and institutions traditionally thought to represent the virtue of morality are caught in, "morally-condemnable" situations. For example:

- The Roman Catholic Church has fallen into disrepute because of the widespread allegations of sexual abuse by clergy.[163]
- The most pious evangelical leaders have been caught up in scandals involving prostitution, sex, drugs and other things considered by society as immoral.[164]
- The attorney general of New York, Elliot Spitzer, so long espoused as a paragon of virtue, was felled by a prostitution scandal.[165]

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[160] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 34 (2007).

[161] *Id.* at 35. Judge Posner, on his blog, has stated that people want to conceal facts that are "embarrassing or discreditable." He argues that people want to hide the embarrassing information about themselves that go against cultural taboos. *Id.* Gary Becker & Richard Posner, The Becker-Posner Blog, *available at* http://www.becker-posner-blog.com/archives/2005/05/posner_on_priva.html (last visited Jan. 5, 2010).

[162] Lawrence Kubie, M.D., *Psychiatric Implications of the Kinsey Report*, PSYCHOSOMATIC MEDICINE: J. OF BEHAVIORAL MED., Oct. 2, 1995, at 1, *available at* http://www.psychosomaticmedicine.org/cgi/reprint/10/2/95.pdf (last visited Jan. 20, 2010).

[163] Cathy Lynn Grossman, *Faithful Endure Another Year of Scandal, Schism*, USA TODAY, Dec. 22, 2003, *available at* http://www.usatoday.com/news/religion/2003-12-22-religion-usat_x.htm (last visited Jan. 5, 2010).

[164] Wikipedia, *List of Christian Evangelist Scandals*, *available at* http://en.wikipedia.org/wiki/List_of_Christian_evangelist_scandals (last visited Jan. 20, 2010).

[165] Danny Hakim & William K. Rashbaum, *Spitzer is Linked to Prostitution Ring*, N.Y. TIMES, Mar. 10, 2008, *available at*

• Senator Condit was exposed as having an affair with an intern despite being married.[166]

• Senator Larry Craig, a grandfather, pled guilty to disorderly conduct after being arrested for soliciting homosexual sex in a public bathroom.[167]

• The Episcopal Church U.S.A. consecrated an openly, homosexual bishop.[168]

• Celebrity actors and entertainers stage their comebacks based on drunk antics, DUI's, and stints in rehabilitation programs.[169]

• Olympic gold medalist, Michael Phelps, was pictured using a bong, purportedly to smoke marijuana, at a party.[170]

Comparing the political careers of Bill Clinton and Barack Obama provides an excellent illustration of society's rapidly changing attitudes toward morality and as a result privacy In 1992, presidential candidate Bill Clinton "thought marijuana use could be enough of a liability [that he was] compelled to say he had not inhaled."[171] Sixteen years later, President Obama, on the other hand, gained widespread acceptance from the youth by talking openly about his extensive previous drug use as a

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http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html (last visited Jan. 5, 2010).

[166] Dana Bash, *Senator Says She Urged Condit to Go Public*, CNN.COM, *available at* http://archives.cnn.com/2001/US/07/10/condit.feinstein/index.html (last visited Jan. 5, 2010).

[167] Dana Bash & Jessica Yellin, *Craig: I Did Nothing "Inappropriate" in Airport Bathroom*, CNN.COM, Aug. 28, 2007, *available at* http://www.cnn.com/2007/POLITICS/08/28/craig.arrest/index.html (last visited Jan. 5, 2010).

[168] Laurie Goodstein, *Openly Gay Man is Made Bishop*, N.Y. TIMES, Nov. 3, 2003, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C00E3D71130F930A35752C1A9659C8B63 (last visited Jan. 5, 2010).

[169] Liss Ross, *Rich, Fabulous, and Drunk: Celebrities and DUI's*, ASSOCIATED CONTENT, May 7, 2007, *available at* http://www.associatedcontent.com/article/231145/rich_fabulous_and_drunk_celebrities.html (last visited Jan. 5, 2010).

[170] *Sheriff Investigates Whether Michael Phelps Smoked Pot*, CNN.COM, Feb. 3, 2009, *available at* http://www.cnn.com/2009/CRIME/02/03/sheriff.phelps.marijuana/ (last visited Jan. 17, 2010).

[171] Lois Romano, *Effect of Obama's Candor Remains to be Seen*, WASHINGTON POST, Jan. 3, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/02/AR2007010201359.html (last visited Jan. 5, 2010).

candidate, and is the first candidate to admit to the use of cocaine.[172]

These events, in effect, encourage the disclosure of information usually held private for fear of moral condemnation by society. The easily disseminated nature of ESI increases public awareness of these moral realities. As society recognizes that the behaviors typically associated with a good reputation may be an unrealistic, unattainable ideal no longer worthy of protection, people divulge more information previously kept private to protect a "moral reputation."

The ESI catalyzed the decline in informational privacy, and the changing paradigm of information sharing, facilitated by the rules relating to electronic discovery and necessitated by changing societal norms, provides an opportunity for our civil legal system to borrow from the Continental system of civil justice and to be transformed from a system concerned only with resolution of disputes to one simultaneously concerned with both the discovery of material truth and dispute resolution. [173]

## IV. Declining Privacy and an Improved Civil Justice System

### *A. Continental and American Justice Systems Compared*

The major differences between the inquisitorial continental legal system, typified for example by Germany and France, and the American adversarial legal system may be summarized as follows. The American system is "characterized by a high degree of partisan behavior, party autonomy, judicial passivity and reliance on lawyers' integrity."[174] In stark contrast to the American adversarial system where truth is often subordinate[175] to

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[172] *Id.*

[173] *See supra* Part IV.C.

[174] Law Reform Commission of Western Australia, *Advantages and Disadvantages of the Adversarial System in Civil Proceedings*, *available at* http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-2civiladvers.pdf (last visited Jan. 5, 2010) [hereinafter *Advantages and Disadvantages*].

[175] Theodore L. Kubicek, Adversarial Justice America's Court System on Trial 37-45 (describing the subordination of truth in the criminal justice system with arguments equally applicable to the civil justice system).

privacy, [176] is the Continental or inquisitorial system, where resolution of disputes is not party driven before a neutral and passive judge but involves an inquiry conducted by the court which is not confined to submissions of the opponents.[177] In this setting, there are theoretically no restrictions on fact-finding activity[178] and no presentation of partisan evidence or of facts; rather, the judge determines facts, interrogates witnesses, formulates issues, and renders a decision.[179] The continental system therefore involves the judge as an active participant undertaking an "uninhibited search for the truth."[180]

The adversarial justice system is often criticized because resolution is often at the expense of truth, resolution is slow, and party control of litigation mixed with the requirement of zealous advocacy leads to distrust in the factual development because parties are likely to present only evidence buttressing their position.[181]

Additionally, the American system has been criticized for allowing only the wealthy effective court access.[182] Contributing to the high cost of litigation to parties is the cost of discovery and pretrial fact gathering in an adversarial system.[183] Discovery in civil trials is subject to abuse and in fact, despite its original aims of promoting fact finding in hopes of a more efficient resolution, there is evidence that discovery is the most inefficient and expensive way to obtain information for trial.[184]

Yet discovery as opposed to trial remains essential to the resolution of disputes in the civil system since only two percent of civil actions are now resolved at trial.[185] In fact, one British

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[176] SCALLY, *supra* note 9, at 2 (describing the struggle between the search for truth and respecting privacy and freedom from humiliation and abuse).

[177] *Advantages and Disadvantages*, *supra* note 174, at 25.

[178] SCALLY, *supra* note 9, at 4.

[179] *Id.* at 4-6.

[180] *Id.* at 4.

[181] LANDSMAN, *supra* note 16, at 24-33.

[182] *Id.* at 30.

[183] *Advantages and Disadvantages*, *supra* note 174 at 34 (discussing a finding by the Judicial Conference of the U.S.).

[184] KUBICEK, *supra* note 175, at 107.

[185] *See* Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, *available at* http://www.judicialaccountability.org/articles/nomoredayincourt.htm (last visited Jan. 5,

lawyer observing the American justice system commented, "An American is incapable of handling a case without discovery and deposition. Discovery is his shower and deposition is his breakfast."[186] Even if the normative expectation of inquisitorial justice, the discovery of truth, is actually achieved, Americans would still reject this idea of justice for the following reasons.

### *B. American Obstacles to Implementing Inquisitorial Justice*

At the core of adversarial justice is the belief that party control of litigation affirms human individuality[187] and prevents tyranny and state overreaching.[188] Additionally, the adversarial nature of pretrial discovery is a reflection of many core American values including, individualism, egalitarianism, laissez-faire, populism, and anti-statism.[189]

The adversarial system of justice also reflects American distrust in concentrated power and the belief that a neutral judge would not apply the same zeal to discovery in "ferreting" out the positives of their cases and the negatives of their opponent's.[190] In contrast, "Continental civil procedure '[graciously tolerates] incompleteness of evidentiary material' [and] the protagonist who tends to monopolize fact gathering—the judge—is not

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2010). In this article, the author describes the phenomenon of the rarity of trials in litigated matters, explaining:

> In reality, according to a new study, trials have become quite uncommon. In 1962, the study says, 11.5 percent of all civil cases in federal court went to trial. By [2002], that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.

*Id; see also* KERMIT HALL & KEVIN MCGUIRE, THE JUDICIAL BRANCH 325 (2005).

[186] Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292 (2002) (internal citation omitted).

[187] LANDSMAN, *supra* note 16, at 35.

[188] *Id.* at 35-36; *see also Advantages and Disadvantages*, *supra* note 174, at 28 (demonstrating the existence of the argument that the adversarial system provides a restraint on state power).

[189] Chase, *supra* note 186, at 292-96.

[190] *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 309 (2002).

really very energetic or resolute in his probing.'"[191] On the other hand, the adversarial system utilizes the power and motivation of self interest to develop the proofs.[192] Of course, "the supposed efficiency of the adversarial system in fact finding and high quality legal argument is itself crucially dependent upon each side being able to fund a lawyer or legal team to roughly the same extent, and upon each side's lawyer being competent, expeditious, and ethical."[193]

The reality is however, public perception of the fairness of the adversarial system is less than stellar because the public is acutely aware that more money tends to buy more competent, zealous and ethical lawyers.[194] The belief that the adversarial system is effective in preventing the concentration of power is also questionable because wealthy corporations are able to concentrate as much power as some nation states.[195] Ironically, the average person may not be able to challenge this corporate concentration of legal power and resources without assistance from the state.[196]

Realistically, in the American system there are not nearly enough judges to replace adversarial parties and their lawyers as the principal investigators and developers of facts and evidence.[197] Another related reason the continental system may not be appropriate is the argument commonly put forth that the adversarial system is cheaper since there is no large state judiciary to fund.[198] However this argument is due to "creative accounting" since the cost of the adversarial system is not necessarily lower, but borne by the parties instead of society as a whole.[199]

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[191] *Id.* at 309-10 (citation omitted); *see also Advantages and Disadvantages*, *supra* note 174, at 25 (discussing that this may be an illusory benefit in terms of the adversarial system).

[192] *Advantages and Disadvantages*, *supra* note 174, at 25.

[193] *Id.* at 27.

[194] KUBICEK, *supra* note 175, at 63-65; *see also Advantages and Disadvantages*, *supra* note 174, at 28.

[195] KUBICEK, *supra* note 175, at 63-65.

[196] *Id.*

[197] *See* Subrin, *supra* note 190, at 309.

[198] *Advantages and Disadvantages*, *supra* note 174, at 25.

[199] *Id.* at 27.

### *C. The Hybrid Afforded by ESI and Reduced Privacy*

The rules regarding electronic discovery and changes in the nature of privacy now provide us the opportunity to marry this laudable continental goal of truth seeking with the adversarial process while retaining the American values which are inapposite to the inquisitorial system of justice. By exploring the full potential of Federal Rule of Evidence 502(d) and shifts in privacy paradigms, a discovery model which is cheaper, more efficient, and geared simultaneously towards truth seeking and adversarial justice emerges.

As more and more new documents are being stored electronically, the norm in discovery will be the discovery of electronically-stored information which requires the observed shift in the traditional discovery paradigm.[200] The sharing of information, first thought of as a necessary evil in some of the early cases, confronted with the uniqueness of discovery of ESI, has now been codified in Federal Rule of Evidence 502(d).[201] This, as previously mentioned, is a decline in the recognition of zones of informational privacy.[202] This decline in privacy in the discovery arena is further reflective of a decline in society's notions of informational privacy as well.[203]

Extrapolating the change in privacy further to a society where magnetic storage of information is the sole data storage methodology and informational privacy becomes a thing of the past, these "anomalies" in discovery and changes in privacy will become the norm rather than the exception. Already today, in electronic discovery, parties are given access to all of the other party's information because the cost of preproduction-document review is so high in the electronic storage age.[204]

Whether we openly admit that this alters or obliterates informational privacy zones or we pretend it does not and rubber stamp "privileged" on a document already viewed by opposing party but deemed not admissible in evidence because it is sub-

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[200] *See supra* Part II.B.
[201] *See supra* Part II.B.
[202] *See supra* Part II.B.
[203] *See supra* Part IV.B.
[204] *See supra* Part II.B.

sequently described as privileged pursuant to Rule 502(d) is really unimportant. Either way, the information is no longer unknown or unknowable to the opposing party and asking people to unlearn information is unrealistic.[205] Couple this with the rapid societal decline in the notion of private information and a new model of civil litigation emerges where the truth will be there for all parties to discover freely.

Instead of expending litigation capital on using privacy to inhibit access to facts and to limit the facts available for consideration, the principal role of the lawyer will be to search, sort, and arrange the massive data field consisting entirely of ESI and available to all parties. Each adversary would, as in the present system, apply the evidentiary rules to argue certain facts within the factual universe, now accessible by all parties, are not *reliable* enough to be admissible at trial. The difference in the hybrid system is that all "knowable" facts or truths would be available for consideration by all parties to the dispute.

Once the parties in a dispute take a formal adversarial posture, the opinion work product doctrine would prevent any subsequent litigation strategies by the lawyer from remaining secret. In other words, the legal theories and strategies of the attorney would remain private, but, the facts upon which those theories are based would be knowable to all. In a way, this resembles the current appellate system where parties apply legal theory to a known set of facts, the record. Interestingly, the appellate system is considered a corrective mechanism for an error-prone adversarial trial mechanism.[206]

In this regard, the attorney-client privilege would be rendered obsolete to the extent it protected factual information, but to the extent the attorney communicated with the client about litigation strategy or his thoughts regarding the same, this would overlap with the protection of the work product doctrine. The notion of doing away with a factual attorney-client privilege is not as radical as it seems. Modern scholarship challenges the

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[205] *See* Daniel, *supra* note 54, at 682.

[206] *See* LANDSMAN, *supra* note 16, at 19 (discussing the development of appellate procedures in the adversarial system).

normative assumptions regarding established Wigmorean rationales about the privilege and confidentiality.[207]

Academics believe, "privilege encouraged clients to provide complete, accurate information to their counselors so that the lawyers could represent their clients competently."[208] Justification for this privilege assumes without privilege or confidentiality the client would not disclose the information to the attorney and therefore the information would never have come to light, resulting in an evidentiary "wash" and no net harm to the justice system.[209] However, emperical studies show Wigmore's behavioral assumptions to be overgeneralizations[210] and current applications of privilege actually result in the suppression of highly relevant evidence and hence to unjust litigation outcomes.[211]

The continental system is also criticized because even though the search for the truth is unhindered by the notion of privacy zones and partial presentation of facts, the judge, as part of a bureaucracy, is lazy and unmotivated to seek the truth.[212] The adversarial process and self interest will ensure the fervent search for the truth among the openly available facts but, as in the inquisitorial system, there would be no limit on access to dispositive facts. As a result, the role of the lawyer

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[207] *See, e.g.*, Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 156-62 (2004).

[208] Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS, 477, 481-82 (2002).

[209] *See* Imwinkelried, *supra* note 207, at 154.

> [T]he privilege would protect only . . . statements that would not otherwise have been made." Even in the imperfect world he lived in, Wigmore believed that if the courts rigorously applied his criteria, in the vast majority of cases the privileges would suppress only statements which would not have been uttered but for the assurance of confidentiality they furnish. Wigmore thought that there would be a "wash"—the justice system would not be in a worse net position when the trial judge enforced the privilege to exclude evidence because in most instances, absent the privilege the evidence would never have come into existence.

[210] *See* Imwinkelried, *supra* note 207, at 182.

[211] *Id.* (explaining the application of privilege law has been "bought at the price of justice.")

[212] *See* Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. JUR. COMP. L. 839, 843 (1997).

will no longer be primarily concerned with developing the factual universe but will shift to effectively exploring and mining it. Once the factual truth is revealed by fervent adversarial mining of the open factual universe, the role of the lawyer will be to adversarially research and apply the law to achieve the most favorable outcome for her client. Again, the adversarial process alleviates traditional American concerns about a lack of zeal in inquisitorial justice.[213]

Furthermore, concerns of state involvement are mitigated because the judges in this new system would be no more involved in the process than they currently are in the adversarial model. In fact, they may be less involved in litigation because most of the disputes in litigation are about discovery and which facts are admissible and which facts are protected as private information.[214] In a system where access to facts is unimpeded, all disputes regarding access to facts are rendered obsolete.

The hybrid system also negates the concern that availability of truth in the continental system requires an increase in the size of the judiciary thereby alleviating any concerns about the concentration of authority in the state, typical of the continental adversarial system.[215] In the hybrid system, retained adversarial processes would result in truth being discovered even more effectively than the continental system, while simultaneously protecting the societal values reflected by the adversarial system.[216] In fact, this new role of the lawyer would be closer to the role originally envisioned for lawyers; persons who possessed a

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[213] *See supra* Part IV.B.

[214] Institute for the Advancement of the American Legal System, University of Denver, *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, Aug. 1, 2008, *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650 (last visited Jan. 5, 2010) [hereinafter *Trial Lawyers Task Force*] (explaining that factual access is typically the most important part of litigation); *see also infra* Part I (demonstrating that discovery or the search for facts is a balance between the search for truth and recognition of informational privacy).

[215] *Advantages and Disadvantages*, *supra* note 174, at 28.

[216] *See* Subrin, *supra* note 190, at 309 (discussing the continental system's notoriety for inertia and laziness in fact discovery). Additionally, combining the adversarial and continental systems is not too much of a stretch. Modern continental systems tend to have adversarial properties as well. *See, e.g.*, Damaska, *supra* note 212, at 840.

set of unique skills to be used for the resolution of societies' disputes.[217] To a large extent, discovery changed the role of the lawyer from a "trial lawyer" to a "litigator."[218]

The new paradigm of discovery and informational privacy would also make more sense in terms of ethics.[219] It would negate many of the ethical conflicts caused by the normative tension between three competing ethical considerations; zeal,[220] confidentiality,[221] and candor.[222] At least one scholar thinks the mandates of the ethical rules are unfair in asking the lawyer to simultaneously be, a "champion in forensic roughhouse and a guardian of the temple of justice."[223]

More concretely, there is a potential for conflict between the electronic discovery paradigms, their associated preproduction access to information, and the confidentiality requirements of Model Rule of Professional Conduct 1.6 which states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."[224] That potential for conflict is greatly overstated however. The model rule is not violated if the lawyer obtains informed consent for disclosure of the otherwise confidential information.[225]

In the cases involving electronic discovery, lawyers should not have trouble obtaining informed consent. The lawyer would simply explain to the client that he would be happy to conduct the preproduction-privilege review to avoid giving the adversary everything. However, the fees associated with preproduction-privilege review of the massive computer storage system would

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[217] *See* Russel G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995).

[218] Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV 479, 484-85 (1995).

[219] Scholarly argument abounds that complying with ethical principles of the rules may be an antiquated pipedream. *See, e.g., id.* at 503. Even if we concede the ethical rules are the lawyer's equivalent of the fictional antebellum south they remain very relevant to the practice of law and this article discusses conforming with them.

[220] *See* MODEL RULE OF PROF'L CONDUCT R. 1.3 cmt.1 (2004).

[221] MODEL RULE OF PROF'L CONDUCT R. 1.6 (2004).

[222] MODEL RULE OF PROF'L CONDUCT R. 3.1 (2004).

[223] *See* LANDSMAN, *supra* note 16, at 204.

[224] MODEL RULE OF PROF'L CONDUCT R. 1.6(a) (2004).

[225] *Id.*

be excessive and timely, and the client would be responsible for this fee. The lawyer would then inform the client that another option exists. Both sides could provide to each other all the information, subject to a claim of privilege being asserted later on. The confidentiality would be gone but the privilege and work product protection would still be available from an evidentiary standpoint.[226] In all likelihood, the reality of the expense would lead to the client's informed consent. This waiver of confidentiality in the age of electronic discovery and diminished privacy, may be the only way to allow cost effective litigation.[227]

Currently, a significant portion of the conflict about the limits of confidentiality, zeal, candor, and privacy occurs in discovery as lawyers fail to disclose witnesses, evidence and documents or try to swamp the opposing side with frivolous discovery requests all in the name of controlling the factual universe of the litigation.[228] Under current discovery norms, the aim of the lawyers in discovery is to control the facts available for consideration in a dispute by not disclosing pursuant to an asserted privilege or to compel disclosure via a motion to compel discovery or disclosure.[229]

The current sanctions framework for violation of disclosure or discovery encourages this frivolity because, absent a motion by opposing counsel, the court may only sanction a party for failing to disclose by preventing the party from using, "that information or witness to supply evidence on a motion, at a hearing, or at a trial . . . ."[230] The sanction seems almost to encourage the nondisclosure since a party would happily be barred from using a witness it did not disclose because they felt the information or witness was harmful to them. The Supreme Court openly recognizes "the common lament that the success of judicial su-

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[226] Sedona Conference, *supra* note 55, at 54:34-55:40.

[227] *See supra* Part II.A-B (discussing the prohibitive cost of e-discovery under the paper discovery paradigm).

[228] *See* Conrad J. Jacoby, *E-Discovery Update: My E-Discovery Holiday Wish List,* LLRX, Dec. 14, 2008, *available at* http://www.llrx.com/columns/ediscoverywishlist.htm (last visited Jan. 5, 2010) (indicating fact discovery is responsible for 70% of all litigation costs).

[229] *See supra* Part I.D (discussing the motion practice associated with protective orders and motions to compel discovery).

[230] FED. R. CIV. P. 37(c)(1).

pervision in checking discovery abuse has been on the modest side."[231]

More severe sanctions are only possible after a motion is filed and a hearing had.[232] My own practice experience and conversation with members of the judiciary indicates, however, that discovery sanctions are in reality a measure of last resort because the discovery rules contemplate extrajudicial resolution of discovery disputes.[233] This belief is unrealistic in a system where discovery's importance is such that the major role of the lawyer is not typically to prepare for trial but to adversarially control the facts available to the tribunal and opposing counsel.

> Most cases settle, and victory is not in the scathing cross [examination], but in the tedious review of documents. Success is in the details, the expertly drafted interrogatories or request for records, and in the ingenious strategy to obtain the statement allegedly protected by privilege. For it is Discovery which we do. The motions, the papers the depositions. This is the numbing ditch digging work that determines the winner. [234]

There is no denying that "[t]he discovery system is in fact broken. Discovery costs too much and has become an end in itself."[235]

In a world where access to factual information is available to all, the role of the lawyer would no longer be one of a forensic, fact-finding roughhouse, but the lawyer would then concentrate on becoming a skilled strategist whose major function would be to zealously and skillfully apply and distinguish cases based on a set of facts knowable by all parties. This role would be more amenable to the compliance with current rules of professional conduct because the ethical principles embodied in those rules find their empirical basis in a view of the legal profession where

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[231] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

[232] FED. R. CIV. P. 37(c)(1)(A-C).

[233] *See* FED. R. CIV. P. 26(c)(1) & 37(a)(1) (mandating parties certify they have tried in good faith to resolve the issues before filing motions for protective orders and to compel discovery respectively).

[234] *See* Subrin, *supra* note 190, at 299-300. My colleagues practicing in federal court comment they have had to take some cases to trial that they otherwise would not just so they would remember how to try cases.

[235] *See Trial Lawyers Task Force*, *supra* note 214.

the lawyer was not a detective whose skill at searching for the facts earned him his living, but a uniquely noble person whose primary goal was resolution and problem-solving for broad societal benefit based on a unique skill set he possessed.[236]

In addition to all being generally modeled on an outdated paradigm,[237] the vagueness of ethical rules regarding candor and duty to the tribunal currently allows lawyers to rely on their practical indeterminacy while giving weight to the more specific rules relating to client interest, such as zeal and confidentiality.[238] Natural offshoots of this imbalance are a winning-is-everything attitude and abuse of discovery to withhold factual information during the discovery process in the interest of their client.[239] The resulting unjust outcomes embody the problems of current adversarial civil justice and illustrate the need for reformation of informational privacy or privilege.[240]

Professor Lasso hoped that the 1995 amendments to the Federal Rules of Civil Procedure, which mandated disclosure, would force lawyers to reexamine their roles as adversaries and as a result, solve the aforementioned problems associated with

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[236] *See,* Pearce, *supra* note 217, at 1231. The author discusses this issue, stating:

> Created in the late nineteenth century in response to rising concerns that entrepreneurial aspects of law were undermining the profession's reputation, the Professionalism Paradigm rests on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy. The conditions that made this bargain possible and necessary all require distinguishing a profession from a business. Under the paradigm, lawyers differ from businesspersons in that they possess esoteric knowledge inaccessible to lay persons. The paradigm also holds that, in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest. The combination of inaccessible knowledge and altruism makes both impractical and unnecessary the outside regulation of public and market to which businesses are subject.

*Id.*

[237] *See id.*

[238] *Advantages and Disadvantages*, *supra* note 174, at 39.

[239] *See* Lasso, *supra* note 218, at 481 (discussing the winning-is-everything mentality of the adversarial system); *see also id.* at 485 (describing discovery as "time consuming, inefficient and unfair dispute resolution" such that there is "unanimous demand for discovery reform").

[240] *See* Imwinkelried, *supra* note 207, at 182.

discovery.[241] However, his hopes did not come to pass as the same complaints about discovery remain pervasive.[242]

Perhaps one reason the disclosure requirements did not result in the anticipated improvements in the discovery system is that it left lawyers with little incentive to disclose because of the weak sanction structure regarding failure to disclose.[243] Another reason is the inherent and core beliefs that adversarial justice has to be, well, adversarial and that anything helping the adversary is unethical.[244]

The electronic discovery rules are different from the disclosure rules in that the lawyer has no choice but to share information in electronic discovery cases since ESI renders searching his own client's factual database for facts that were traditionally suppressed in discovery as "private," too expensive and unfeasible.[245] If lawyers want to litigate in the age of electronically-stored information, they must engage in the sharing of information involved in the quick-peek and clawback agreements encouraged by the 2006 amendments to the Federal Rules of Civil Procedure and the enactment of Federal Rule of Evidence 502(d).[246]

The real magnitude of the sharing required by electronic discovery, despite Rule 502(d)'s allowance for reasserting privacy after disclosure, only becomes apparent by recognizing that an opponent who learns information simply cannot unlearn it,

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[241] *See* Lasso, *supra* note 218, at 526.

[242] *See Trial Lawyers Task Force*, *supra* note 214.

[243] *See supra* notes 214-15 and accompanying text.

[244] *See* Lasso, *supra* note 218, at 481. Lasso responds to reading the new 1995 disclosure amendments to the Federal Rules of Civil Procedure, explaining:

> When I first read the new rules' requirement that a party automatically disclose information previously required only upon a formal discovery request, I had some trepidation about such a radical departure from established practice. Voluntary disclosure of information that might expose the faultlines in a client's case seemed at first like high treason. Voluntary disclosures also seemed antithetical to the adversary process because, by providing a level field in discovery battles, they diminish the advantage that a cunning lawyer might have over a less gifted opponent.

*Id.*

[245] *See supra* Part II.A-B (discussing the change necessitated by the storage and discovery of electronically stored information).

[246] *See supra* Part II.B (discussing the effect of the amendments to Fed. R. Civ. P. 26 and the enactment of Fed. R. Evid. 502).

and that an adversary who learns of the information during electronic discovery can use it in litigation despite formalistic claims of confidentiality, privilege, or protection.[247]

Rule 502(d) and electronic discovery may be the beginning of a broader change related to informational privacy. In the not-too-distant future as we become comfortable accepting the reality that informational privacy is impossible and irrelevant in a spaceless, Facebook-driven world, the nature of the discovery process, and hence the adversarial system of justice, will be modified.[248]

Conflicts between zeal and factual candor to the tribunal would also be reduced if all factual information became available to all parties. The only remaining conflict between zeal and candor would be the attorney's failure to reveal legal authority directly adverse to his client's position.[249] This however is a minimal conflict because the rule only requires revelation of legal authority which is "directly adverse."[250] Any lawyer, especially one freed from the rigors of fact discovery, could easily distinguish the authority such that it is not "directly adverse."[251] Additionally, whether it is because factual information is currently protected by up to three privacy doctrines, under an adversarial regime it is more acceptable to hold each of the parties responsible for finding their own law since its availability is not something the opposing party could monopolize as in the case of facts.

Imagine the role of the lawyer in a world where discovery is about being able to manage and apply the information comprising the entire truth rather than one where it is about obtaining that information. The changes in discovery regarding ESI

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[247] *See supra* Part II.C (discussing the real impact of clawback and quick-peek agreements on privacy and confidentiality).

[248] *See supra* Part III.C (explaining the reasons for the rapid and substantial decline in informational privacy necessitated by the advent of ESI).

[249] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2008). Additionally, under an adversarial regime it is more acceptable to hold each of the parties responsible for finding their own law since its availability is not something the opposing party could have a monopoly on as in the case of facts.

[250] *Id.*

[251] A single factual discrepancy between the adverse authority and the lawyer's case renders the adverse authority "indirect."

represents a broader societal change and quite possibly a redefinition of human creativity, as we transition from a world where access to information is valuable to one where efficient use of readily accessible information is the next skillful commodity. These radical changes related to information accessibility have already been noted for many years in the corporate sector and in economic theory as the contribution of information to GNP continues to rise,[252] and as new economic models develop to deal with this shift.[253]

Some might argue that the justice system proposed by this article glosses over the distinction between different types of informational privacy. For example, corporations may not be as casual or comfortable with the decline in informational privacy, especially as it relates to trade secrets. The easy answer is that this piece presents a system akin to the concept of economic efficiency, in that it represents a utopian perfection which even though it might be unattainable, we should still strive for. However, corporate comfort with informational privacy is no different than the choice some people make today to avoid the online social networking phenomenon.

The decision for a corporation really is a balancing of the costs and benefits of not storing trade secrets electronically versus storing and distributing information electronically to gain a vast competitive advantage.[254] Trade secrets, however, are anomalous because any minimal advantage gained by storing this type of information electronically is dwarfed by the benefits of ensuring privacy by not storing this information electronically. For example, as far as Kentucky Fried Chicken is concerned, the process is deliberately archaic:

> The recipe has been stashed at the company headquarters for decades, and for more than 20 years has been tucked away in a filing cabinet equipped with two combination locks. To reach the cabinet, the keepers of the recipe would first open up a vault and unlock three locks on a door that stood in front of the

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[252] *See, e.g.*, PHILIP EVANS, BLOWN TO BITS: HOW THE NEW ECONOMICS OF INFORMATION TRANSFORMS STRATEGY 11 (2000) (discussing generally the shift in the corporate model as we shift into an information dominated economy).

[253] *Id.* at 15-17.

[254] *Id.* at 11-14.

> cabinet. Vials of the herbs and spices are also stored in the secret filing cabinet. "The smell is overwhelming when you open it," said one of two keepers of the recipe in an interview at company headquarters. The biggest prize, though, is a *single sheet of notebook paper, yellowed by age, that lays out the entire formula — including exact amounts for each ingredient — written in pencil and signed by Sanders.*[255]

In corporate America, electronic networks are already being replaced by networks considered open or accessible by entire industries. As this continues, information flows more freely increasing everyone's transparency.[256] The legal reality of coming decades will be based on the realization that since access to information in a world of declining privacy is symmetrical, there will be no need for control of information as is currently the norm.[257]

## CONCLUSION

The radical changes discussed by this piece should be read in light of the following: Forty-two years from now at the middle of the century anyone over forty years old and reading this piece will likely be dead.[258] Also dead will be the model of informational privacy that the deceased group espoused. Forty-two years in terms of internet usage and privacy norms is an eternity considering that Facebook was launched in February 2004 and now has about 175 million members, adding users at the rate of 5 million per week.[259]

The civil justice system is in need of major repair.[260] More precisely, the discovery system is broken.[261] The new amendments to the civil discovery rules do not fix the problem but

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[255] *KFC Shoring Up Security for Secret Recipe*, USA TODAY, Sept. 9, 2008, *available at* http://www.usatoday.com/news/nation/2008-09-09-kfc-recipe_N.htm (last visited Mar. 6, 2009) (emphasis added).

[256] EVANS, *supra* note 252, at 30, 218.

[257] *Id.* at 218.

[258] *See Life Expectancy in USA Increases to 77.6 Years; Deaths from Heart Disease, Cancer Decline, Report Finds*, MEDICAL NEWS TODAY, Mar. 3, 2005), *available at* http://www.medicalnewstoday.com/articles/20557.php (last visited Jan. 17, 2010).

[259] *See supra* note 129 and accompanying text.

[260] *See, generally*, KUBICEK, *supra* note 175.

[261] *See Trial Lawyers Task Force*, *supra* note 214.

merely tinker around the edges.[262] Asking participants in today's business model of litigation to comply with ethical rules of a bygone era is akin to asking the modern military to fight with clubs.[263]

Repairing the civil justice system requires recognizing the paradigm shifts in informational privacy and adjusting the litigation model to suit. In so doing, much of the expense of litigation currently attributed to fact-finding would diminish. People are simply more comfortable with information about themselves being known. In today's world of ESI and internet, application of factual knowledge rather than obtaining factual knowledge is the valuable commodity. The need for the attorney-client privilege and ethical confidentiality is questionable if the demise in informational privacy is extrapolated to the not too distant future.

The legal profession should embrace this societal shift and expand the information-sharing model created by Federal Rule of Evidence 502(d) and the 2006 amendments to the Federal Rules of Civil Procedure. The potential result is a civil justice system which remains appealing to the public, operates within workable ethical parameters, and permits the search for truth while maintaining the safeguards of adversarial justice.

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[262] *Id.*

[263] *See,* Pearce, *supra* note 217, at 1231 (indicating that the rules of ethics are outdated and of limited utility). Similarly, fighting a modern military battle with the weapons of prehistory is an exercise in futility.

# PROFITS ABOVE THE LAW: CHINA'S MELAMINE TAINTED MILK INCIDENT

*Chenglin Liu*[*]

## INTRODUCTION

On May 1, 2008, Yi Kaixuan, a five-month-old boy, died in the Gansu Province of China.[1] His mother collapsed in grief several times and suffered insomnia and rapid weight loss. His father, to avoid being reminded of the sudden loss, burned almost every trace of baby Kaixuan's existence, from photos to clothes to birth footprints.[2] The child's family agonized without knowing what actually caused Kaixuan's death until four months later. From the news, the family learned that Sanlu baby formula, which the family had fed Kaixuan since his birth, had been tainted with melamine. It was melamine, an industrial substance used for making plastics, which caused Kaixuan to suffer serious kidney stones leading to his painful death.[3]

The melamine contamination was by no means an accident. The World Health Organization (WHO) confirmed reports from China that milk suppliers deliberately added melamine to di-

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[1] There are several reports about Yi Kaixuan's death both in China and abroad. *See, e.g.*, Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1; Edward Wong, *China Recalls More Milk Items for Testing*, N. Y. TIMES, Oct. 15, 2008, at A8; Ng Tze-wei, *Frustration Over Lawsuits in Milk Scandal, Courts Slow to Respond to Cases*, S. CHINA MORNING POST, Oct. 14, 2008, at 8; Cara Anna, *China's Milk Scandal Leads Family to Sorrow and a Rare Lawsuit*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 14, 2008, at A3; Chen Zhong and Xiao Lu, *Quanguo Shouli Sanlu Naifen Zhisi Yinger Jiashu Suopei Baiwan* [*Parents Filed a Lawsuit Seeking One Million Yuan in Damages for the Death of Their Son*], CAIJING [CAIJING MAGAZINE], Oct. 15, 2008.

[2] Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

[3] *Id.*

luted milk in order to deceive quality control review.[4] In further production, milk processors only checked protein levels by measuring nitrogen concentration. As a nitrogen-rich crystalline compound, the addition of melamine increased the nitrogen content and made the adulterated milk appear rich in protein.[5] To make matters worse, some reports alleged that milk processors also added melamine to already contaminated milk in order to cut costs and increase revenue.[6]

According to official estimates, at least six babies had died and nearly 300,000 were sickened from drinking the tainted milk.[7] As of January 12, 2009, "more than 300 children remained hospitalized for treatment."[8] Even worse, for the children who recovered from kidney damage, doctors are unsure whether they will suffer further complications when they grow older.[9]

As the world's largest exporter of consumer goods, the volume of Chinese exports exceeds $1 trillion annually.[10] The im-

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[4] World Health Organization, Questions and Answers on Melamine, *available at* http://www.who.int/csr/media/faq/QAmelamine/en/print.html (last visited Aug. 29, 2009).

[5] *Id.*

[6] *See* David Barboza, *Squeezed by Milk Scandal, China's Dairy Farmers Say They are Victims*, N.Y. TIMES, Oct. 4, 2008, at A5; *see also* Julie R. Ingelfinger, *Melamine and the Global Implications of Food Contamination*, NEW ENG. J. MED., Dec. 25, 2008, at 2746 ("Before the current melamine disaster, the marked dilution of infant formula in China had resulted in marasmus in some infants, which led to government directives to increase the protein content of such preparations or risk severe penalties. Thus, it is possible that the adulteration was conceived in response to a well-intentioned government directive.").

[7] *Weishengbu: Woguo Gong 29 Wan Yinger Miniao Xitong Yin Shi Wenti Naifen Chuxian Yichang* [*The Ministry of Health: Over 290,000 Infants Suffered Urinary Abnormalities from Drinking the Tainted Milk*], XINHUA NET, Dec. 1, 2008; *see also* Will Clem & Lilian Zhang, *Tainted Milk Feared to Have Killed Another Baby*, S. CHINA MORNING POST, Jan. 9, 2009, at 5.

[8] Loretta Chao, *Victims of Tainted Milk File Lawsuit in China's High Court*, WALL ST. J., Jan. 20, 2009, at A10.

[9] Ingelfinger, *supra* note 6, at 2748 ("The bottom line, however, is that nobody knows the true extent of the present epidemic or the risks to come. No more deaths have been reported since the Chinese government and the international public health community became aware of the problem. Yet the long-term health effects remain unknown.").

[10] Joseph Kahn, *China Quick To Execute Drug Official,* N.Y. TIMES, July 10, 2007, at C1; *see also* David Barboza, *Big Recalls Don't Slow Exports from China*, N.Y. TIMES, Oct. 13, 2007, at C1.

pact of the milk scandal went far beyond mainland China.[11] The scandal prompted a number of Asian countries[12] and the European Union to ban food products from China.[13] The U.S. Food and Drug Administration recalled products containing ingredients made in China.[14] The milk scandal further demonstrated the Chinese government's continued failure to adequately regulate its food and drug industry even after previous scandals involving lead-tainted toys, toxic toothpaste, and melamine-laced pet foods.[15] These commercial disasters have resulted in a serious loss of confidence in Chinese-made products worldwide.

The tainted milk scandal should not have been a surprise to either the Chinese government or the public because similar product safety scandals had occurred several times before. In 2004, more than 200 infants in China suffered so called "big head" syndrome due to malnutrition, and at least twelve died, after consuming formula that contained no nutrients.[16] In response, the Chinese government repeatedly expressed concerns about food safety and took action to dismiss responsible officials and overhaul its antiquated food safety regulatory regime. The government sought quality control measures not only due to enormous public pressure but also to restore the shattered public image of Chinese exports, an image critical to China's economic growth which depends heavily upon international trade. To show the world its sincerity about improving the safety of

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[11] *Du Naifen Fengbo Fanwai Kuoda Wushi Duo Guo Ji Jinkou Huo Shouhui Han Shanjv Qingan Zhongguo Zhi Shipin* [*The Milk Scandal Widened, Over Fifty Countries Imposed Import Ban or Recalled Chinese Made Food Products*], SING. MORNING NEWS, Oct. 5, 2008. Two weeks after the news broke, Hong Kong health authorities confirmed that a three-year-old baby girl was treated for kidney stones after drinking Yili, a famous baby formula brand from China. *Id.* A lingering fear of contamination led a number of Asian countries, including Indonesia, the Philippines, Japan and Korea, to either step up inspection or ban dairy products from China. *Id.*

[12] *Id.*

[13] *EU Bans Baby Food with Chinese Milk*, ST. LOUIS POST-DISPATCH, Sept. 26, 2008, at A11.

[14] Larry Smith, *Chinese Candy Tainted with Melamine Found in Connecticut*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 2, 2008, at A5.

[15] David Barboza, *China Moves to Refurbish a Damaged Global Image*, N.Y. TIMES, July 29, 2007, at A6.

[16] Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES, May 5, 2004, at A3; *see also Fuyang Naifen Shijian Jiben Chaqing* [*Preliminary Report on Fuyang Milk Scandal*], RENMIN RIBO HAIWAI BAN [PEOPLE'S DAILY, OVERSEAS ED.], May 17, 2004 at 1.

Chinese made products, the People's Court executed Mr. Zheng Xiaoyu, the former Food and Drug Administration chief in 2007, for taking bribes to approve untested medicine known to have caused death.[17] In August 2008, Mr. Wu, the head of food production supervision at the General Administration of Quality Supervision, Inspection and Quarantine, committed suicide after prosecutors questioned him about his large sum of unexplainable assets.[18] It appeared that the Chinese government had made genuine efforts to fix the scandal-ridden quality control regime. The outbreak of tainted milk, however, proved that these efforts were less than fully effective.

This paper considers China's food safety regulatory regime and the fundamental flaws that permeate both its supervision system and governing laws. Part I examines the market structure in the dairy industry and how the government failed to regulate the chaotic market that forced competitors to externalize costs and resulted in the inevitable milk scandal. Part II addresses how the Sanlu Group and local government concealed the scandal for fear of bad publicity and loss of profits. Part III examines the measures that the Chinese government took in response to this scandal and previous crises. The paper argues that the government should search for a new direction—both in law and policy, because its traditional, paternalistic, top-down style of supervision has failed repeatedly. The paper also argues that the present system does little to prevent the dairy industry from pursuing profits at the expense of consumer welfare, and that the government should regulate the market towards inducing milk processors to internalize the cost of doing business. Furthermore, much could be achieved by consumer participation in product safety issues through private litigation.

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[17] David Barboza, *Questions Swirl After Death of China's Food Safety Chief*, N.Y. TIMES, Aug. 14, 2008, at C4.

[18] *Zhijian Zhongjv Shipinsi Sizhang Shexian Jingji An Zisha* [*Quality Supervision Bureau Food Department Director Committed Suicide*], MEIRI JINGJI XINWEN [THE DAILY ECON. NEWS], Oct. 13, 2008.

## I. MARKET STRUCTURE, COMPETITION AND PRODUCT QUALITY

With increasing domestic demand for milk products, China's dairy industry grew rapidly in the mid 2000's. Approximately 1600 dairy processing firms emerged, 95% of which were small or medium-sized companies.[19] Even though China's dairy industry became highly fragmented,[20] six large milk processors dominated the majority of distribution. According to Babcock Research Institute, the companies Mengniu, Yili, and Bright Dairy accounted for about 42% of China's dairy product sales in 2005. Combined with Sanlu and two other firms, the Big 6 accounted for over 50% of the fresh milk market in China.[21] The competition among the Big 6 was fierce.[22] Yet, the news reported that melamine had been found in dairy products from twenty-two milk processors, the worst offender being Sanlu. Thus the scandal was not just about a particular milk processor, it reflected a serious quality problem deeply entrenched in China's entire dairy industry.

In theory, market competition serves as a vital force to motivate enterprises towards enhancing consumer welfare.[23] This concept, however, has seemingly had little positive impact on the Chinese milk market. While the milk industry market grew to be highly competitive after the conversion from government to private control in the 1990's, the scandal revealed that, in fact, competition delivered lower quality products to Chinese consumers. Contrary to popular wisdom, some scholars have attributed the scandal to the furious competition in the unregu-

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[19] William D. Dobson, *Drivers of Change in China's Dairy Industry—Implications for the U.S. and World Dairy Industries*, BABCOCK INSTITUTE DISCUSSION PAPER NO. 2006-4 14 (2006).

[20] Wang Zhigang et al., *Chinese Consumer Demand for Food Safety Attributes in Milk Products*, 33 FOOD POLICY 27, 28 (2008).

[21] Dobson, *supra* note 19, at 14.

[22] *Id.*

[23] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 12 (Thomson West 2d ed. 2006) ("If there is universal agreement on one antitrust goal, it is that antitrust should strive for the *efficient allocation of society's available goods and services*. One of the costs of monopoly is the loss to consumers that would have purchased the monopolized product or service at a competitive price," but forego the purchase because of monopoly surcharge. (emphasis added)).

lated milk industry.[24] To better understand the problem, it is necessary to consider how China's dairy industry and market developed.

### *A. Demand and Supply of Dairy Products in China*

#### 1. Growing Demand

Traditionally, most people in China did not include milk in their diet. Even today, "China has one of the lowest annual per capita consumption rates [of milk] in the world."[25] The lack of milk consumption persists primarily because of "low income in rural areas, lack of familiarity with dairy products, and lactose intolerance."[26] Yet, milk consumption has dramatically increased over time.[27]

As the economy in China rapidly grew, the government looked for ways to stimulate domestic consumption because experts warned that China must vitalize domestic markets in order to achieve sustainable growth.[28] With increasing income and awareness of the nutritional aspects of food, many ordinary Chinese gradually changed their lifestyle to incorporate dairy products into their diet. Seizing the opportunity, both the central and local governments have vigorously promoted milk consumption. During his tour of a dairy factory, Premier Wen Jiabao famously proclaimed, "I have a dream that every Chinese, especially children, could drink one *jin* [two cups] of milk a day."[29] Towards this goal, and drawing on experience from Japan and Korea, the Chinese government instituted a school milk program. Despite the program's intended coverage of only 1% of

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[24] Gong Qing, *Diaocha Hebei Naiyuan Luanxiang* [*Investigation Report on the Chaotic Raw Milk Market in Hebei*], CAIJING [CAIJING MAGAZINE], Sept. 21, 2008.

[25] Dobson, *supra* note 19, at 2.

[26] *Id.*

[27] *Id.*

[28] Chen Zhiwu, *Zhongguo Jingji Moshi Zhuanxing de Tiaozhan* [*Challenges for the Transition of the Chinese Economic Model*], Investor Participation Network, July 7, 2009, *available at* http://www.aordo.org/html/social_impact/2009-7/21/20090721201332.html. (last visited Jan. 9, 2010).

[29] *Wen Jiabao, "Rang Meige Haizi Meitian Neng He Shang Yijin Nai."* [*Premier Wen Jiabao, "I have a dream that every child in China would drink a pound of milk each day."*], CHONGQING CHENBAO, Apr. 25, 2006.

the 240 million elementary and middle school students,[30] it tremendously expanded milk consumption. By focusing on the young generation, the government's expectation has been to ingrain this lifestyle choice at an early age so that into adulthood ordinary Chinese will likely regard dairy products as indispensable.

Urbanization has also contributed to the increase of dairy product consumption. As economic growth expanded, supermarket chains such as French-based Carrefour extended their presence into midsized and small cities in China.[31] Domestic national supermarkets followed suit. Unlike traditional convenience stores, the supermarket chains invested heavily in refrigeration systems that made it possible to market fresh milk on a regular basis. Additionally, the appetite for fresh milk grew rapidly because an increasing number of consumers owned refrigerators at home.[32] More consumers in remote regions were also able to enjoy milk because of Ultra High Temperature (UHT) processing technology that has extended milk shelf life up to nine months.[33]

Branded milk advertising has also had an impact. Just a few months before the scandal broke, Sanlu secured a high profile advertising agreement with the China Space Program, in which Sanlu became the sole milk provider for Taikonauts (Chinese astronauts).[34] Like Sanlu, other milk producers heavily invested in television commercials that featured athletes, pop stars, scholars, physicians, and government officials who promoted their respective dairy products. According to a survey conducted in 2001, "93% of the sample reported seeing television advertisements for milk products and 73% had seen billboards

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[30] Dong Jun, *Xuesheng Nai Yuan Shengji Jihua Qidong, Rang Haizi He Zuihao de Niunai* [*School Milk Plan Launched to Ensure Children Drink High Quality Milk*], XINHUA NEWS, May 26, 2005.

[31] David Barboza, *The Bold Struggle For China's Belly*, N.Y. TIMES, Mar. 6, 2003, at C1.

[32] Frank Fuller et al., *Got Milk? The Rapid Rise of China's Dairy Sector and its Future Prospects*, 31 FOOD POLICY 201, 204-05 (2006).

[33] *Id.*

[34] *Sanlu Zhu Zhongguo Hangtian Yuan Taikong Aoxiang* [*Sanlu Milk Helps Taikonauts Fly in Space*], Sina Caijing [SINA FINANCE], Aug. 1, 2008. The deal was widely ridiculed by internet commentators. *Id.*

with dairy ads."[35] The milk propaganda was effective especially among young generations who were more prone to the influence of commercials and likely to adopt a western-style diet.[36]

2. The Sanlu Model and the Supply of Dairy Products

Prior to its debacle, Sanlu was a prominent publicly held company whose annual sales exceeded RMB 10 billion Yuan (U.S. $1.4 billion).[37] Based in Shijiazhuang City, Hebei Province, Sanlu originally developed as a collectively-owned enterprise from a small dairy farm with only a few dairy cattle.[38] During the economic reform in the 1990's, Sanlu was transformed into a separate entity, even though the local government retained the power to appoint the CEO and fill other important posts in the corporation.[39] In time, Sanlu became the undisputed leader in China's dairy processing industry, especially after the Fonterra Group of New Zealand, one of the world's biggest dairy exporters, purchased a 43% stake in it.[40] For fourteen years up to the scandal, Sanlu was the largest producer of milk powder, the second largest producer of yogurt, and the fourth largest producer of fresh milk. Sanlu won numerous prestigious awards for best quality.[41] Sanlu was not only one of the most trusted brands, in terms of safety, but was also perceived as a socially responsible enterprise. Shortly after the earthquake in Sichuan Province in May 2008, Sanlu donated RMB 8.8 million Yuan (U.S. $1.2 million) worth of baby formula

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[35] Fuller, *supra* note 32, at 204.

[36] *Id.*

[37] Zhang Dongdong, *Wei Fei Lixing Chengzhang Fuchu Chenzhong Daijia Zhongguo Ruye Tong Ding Si Tong* [*Serious Consequences of Irrational Growth, Lessons Learned from the Milk Scandal*], IFENG FIN. NEWS, Oct. 17, 2008.

[38] For the development of the Sanlu Group, *see* Tian Wenhua, *Sanlu Jituan Ziben Yunzuo de Shijian yu Renshi* [*On Sanlu's Operation*], 2 ZHONGGUO GONGXIAO SHANGYE RUYE DAOKAN [CHINA RETAIL J.-DAIRY INDUSTRY ED.] (2006).

[39] For more information regarding the relationship between local government and enterprises in China, see section C.2 below.

[40] Yao Xiaochen, *Shijie Yuye Jvtou Heng Tian Ran Cangu Sanlu Ruye* [*Fonterra Invested 800 Million Yuan in Sanlu*], RENMIN WANG [PEOPLE'S DAILY NET], Dec. 1, 2005.

[41] *Id.*

to quake victims.[42] Most notably, Sanlu's business model had a great influence on other milk processors.

In contrast to the dairy industry in western countries, milk processors in China have not maintained large dairy farms for their milk supply. Scholars characterized China's milk industry as "milk processors + milk collecting stations + family based dairy farms."[43] In other words, milk processors have heavily relied on small family-run dairy farms to provide raw milk collected by independent milk stations. The three players transacted only on an ambiguous contractual basis, providing each the means to easily default on their obligations to the others.[44] In fact, China's milk processors functioned as a huge middleman between family farmers and consumers. The separation of milk processors and milk providers directly resulted from economic reforms by the government, which promoted separation of ownership and management.[45]

Sanlu was the first milk processor to implement the separation model, often referred to as the Sanlu model (i.e. "sending cows to villages and bringing milk back to town"). In 1987, Ms. Tian, the former Chairwoman and General Manager of Sanlu, put 2000 dairy cows up for sale or rent. Through outsourcing its dairy farms, Sanlu saved 100 million Yuan ($70 million) annually in feed costs. The customary practice evolved whereby individual farmers raised cows in their backyards and milked them at so-called "milk collecting stations" maintained by independent operators. These operators in turn transported raw milk back to Sanlu for processing. This method seemed to work well by enabling local farmers to increase their income, through raising and milking cows, and local governments to consequently increase tax revenues from the dairy farmers. Ms. Tian touted

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[42] *Sanlu Xiang Wenchuan Dizhen Zaiqu Zhaijuan 880 Wan Yuan Yinger Naifen* [*Sanlu Once Again Donated 88 Million Yuan Worth of Baby Formula*], XINLONG CAIJING, May 19, 2008.

[43] DOU MING MASTER ET AL., THE RESEARCH REPORT ON THE DEVELOPMENT OF THE DAIRY INDUSTRY IN CHINA § 5.1 (Beijing Orient Dairy Consultants 2006) (for Albert R. Mann Library of Cornell University).

[44] Qing, *supra* note 24.

[45] Zhou Yubo, *Guoyou Qiye Gaige Lifa Huigu Yu Zhanwang* [*Review of the Reform on Legislation Regarding State Owned Enterprise*], XUEXI SHIBAO [STUDY TIMES], July 14, 2008.

that the Sanlu model completely revolutionized the milk industry, benefiting both local farmers and governments while at the same time dramatically reducing production costs for processors.[46]

Competitors across the country quickly copied the Sanlu model and outsourced their respective dairy bases.[47] The China Dairy Statistical Yearbook 2003 revealed family-based dairy farms raised roughly 75% of the 86.87 million dairy cows across China.[48] As a result, on average, a dairy farm owned only 3-5 cows in 2003,[49] despite the fact that the major dairy processors had promised to establish a concentrated milk supply.[50] By the time the Sanlu scandal broke out, more than 80% of raw milk for processing came from individual farmers.[51] The Sanlu model contributed to further fragmentation of milk supply sources.

In a sheer accounting sense, the Sanlu model was indeed efficient because it externalized the costs which otherwise would have been born by the processors.[52] The model, however, posed serious challenges for milk safety, because milk processors had no control over the quality of animal feed, health problems of dairy cattle, or hygiene conditions in the milk stations.[53] Unfortunately, these problems, including the addition of melamine to boost protein counts, eventually led to the demise of Sanlu. Prior to 2005, Sanlu held a monopoly in Hebei Province,[54] so both dairy farmers and milk stations had no choice but to follow Sanlu's guidelines on milk quality. Yet, even though the quality checks would not have revealed the overuse of antibiotics or ex-

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[46] Baidu Baike, *Sanlu Jianjie* [Brief Introduction to Sanlu Co.], *available at* http://baike.baidu.com/view/182041.htm (last visited Dec.14, 2009).

[47] *Id.*

[48] Jing Yang, T. Gordon MacAulay, and Wenhua Shen, *The Dairy Industry in China: An Analysis of Supply, Demand and Policy Issues*, at 10, 48th Annual Conference of the Australian Agriculture and Resource Economic Society, Feb. 11-13, 2004, Melbourne, Australia, *available at* http://www.aares.info/files/2004_yang.pdf (last visited Dec. 16, 2009). "According to the Chinese Dairy Statistical Yearbook 2003, there were 6.87 million head of dairy cows by the end of 2002. The dairy cows raised by farm households accounted for 75 percent of the total, with each having 3-5 animals on average." *Id.*

[49] *Id.*

[50] Qing, *supra* note 24.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

cessive growth hormone, they did for a time prevent farmers from adding fatal chemical substances to raw milk.[55]

### *B. "Racing to the Bottom": Competition and Quality*

#### 1. Competition for Raw Milk

In 2005, Big 6 milk processors made substantial investments in upgrading processing equipment, either through foreign investors or subsidies from local governments.[56] The increased milk processing capacity made the firms desperate to find additional milk supplies. While the big milk processors clearly knew that the real solution to inadequate supply was to maintain large scale dairy farms of their own, none of them wanted to incur the cost of doing so for fear of being undercut by other firms. Without effective state regulation to check the quality of milk, all the big firms were courting milk providers by lowering quality standards.[57] Consequently, big firms entered the Hebei raw milk market. As a result, Sanlu could no longer leverage a monopoly over dairy farmers and milk stations that had supplied Sanlu for about a decade. Because the contractual relationships between Sanlu and raw milk providers were not strictly enforced, the suppliers frequently switched to other processing firms that promised higher prices and less rigid quality checks.[58] The competition for milk supplies was so furious that big processors knowingly collected substandard raw milk. Mr. Wang Yuliang, a Sanlu marketing manager testified at trial that Sanlu could not afford to refuse substandard raw milk even though it knew the milk was laced with melamine.[59] The reason, according to Mr. Wang was that if Sanlu had refused the tainted milk, it would have certainly lost sources of supply permanently, because other firms would take the milk anyway.[60]

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[55] *Id.*

[56] Fuller, *supra* note 32, at 211.

[57] Qing, *supra* note 24.

[58] *Id.*

[59] Ye Tieqiao, *Gongsu Jiguan Pilu Sanlu Yinman Shishi Zhi Dunai Wailiu* [*Sanlu's Cover-Up Caused Poisonous Milk to Enter the Market*], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 1, 2009.

[60] *Id.*

### 2. Quality Exemption, Inferior Products and the "Prisoner's Dilemma"

Inferior milk quality can also be attributed to lack of government oversight.[61] In 1999, the government established a quality exemption system in the *Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work*.[62] Critics blamed the exemption system for the milk scandal.[63] According to Article 16 of the decision, the government would grant quality exemption status to three kinds of products: (1) products with stable quality for a long time and a high market share rate; (2) products measuring up to or exceeding relevant state standards, and (3) products qualified in three consecutive selective inspections conducted by the quality and technical supervision department.[64] Products that bore inspection-exempted marks were not subject to any regional inspections.[65]

Even though the government claimed that the exemption system was to ensure product safety, its real purpose was to promote a national market and curb problems with local protectionism.[66] At the time the exemption system was contemplated, regional rivals that produced the same products divided markets along provincial border lines.[67] In order to protect regional markets, local governments enacted various rules to make non-local goods more expensive.[68] Regional quality checks were among the measures to fend off competitors. The government believed that the exemption system would facilitate free flow of

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[61] *Id.*

[62] Guowuyuan Guanyu Jin Yibu Jiaqiang Chanpin Zhilian Gongzuo Ruogan Wenti de Juding [Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work], Guanwuyuan Wenjian Guofa 24 [State Council Document No. 24], (1999), Art. 16. Notice of the General Office of the State Council on Abolishing the Food Quality Inspection-Free Provisions, State Council Document Guofa 110 (2008).

[63] Xiao Tong, *Quxiao Mianjian Zhidu Shifou Shifao Hui Fuhuo Difangbaohu* [*The Repeal of Quality Inspection System is Feared to Revive Local Protectionism*], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Oct. 10, 2008.

[64] *See* Guowuyuan *supra* note 62.

[65] *Id.*

[66] *See* Xiao, *supra* note 63.

[67] *Id.*

[68] *Id.*

goods across provincial borders and eliminate local measures to set up trade barriers.[69]

The exemption system contributed to reducing costs for large enterprises, however, it inevitably left a loophole for quality control.[70] Taking quality standards into their own hands, large firms repeatedly lowered quality standards in order to improve cost efficiency.[71] Article 16 also subjected firms who failed to comply with state standards to serious punishment, a provision rarely invoked before the milk scandal.[72] The irony was that with a firm being granted exemption status, who would bother to conduct inspections? As long as consumers did not suffer immediate serious injuries, the exempted firms would enjoy their preferential status for an indefinite period of time.[73]

Studies have shown that "[a]s [new] firms enter the market, they reduce the incentives of existing firms to produce high quality goods and also are more likely to introduce low quality goods."[74] The predicament of the Big 6 milk processors in the Chinese dairy market was, in effect, a live version of the classic "prisoner's dilemma."[75] While knowing that maintaining its own dairy farm was the only way to increase milk safety, no processor was willing to be the first one to incur that cost. Realistically, whoever first invested in building dairy farms would be

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[69] *Id.*

[70] Yu Mansheng, *Sanlu Shijian "Kaowen" Guojia Shipin Mianjian Zhidu* [*Sanlu Scandal Tested the Quality Inspection Exemption System*], NANFANG DAILY NET, Sept. 17, 2008.

[71] *Id.*

[72] *Id.*

[73] Yu Mensheng, *Mianjian Zhidu FeichuYouzhi Mingpai Chanpin Buneng Yilao Yongyi,* [*The Abolition of Quality Inspection Exemption System Ends the Limitless Privilege Enjoyed by Famous Brands*], XIHUA NEWS, Mar. 6, 2009.

[74] Limor Golan, Christine A. Parlour & Uday Rajan, Racing to the Bottom: Competition and Quality 17 (Nov. 7, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028375 (last visited Jan. 9, 2010).

[75] JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 40-41 (Thomson West 4th ed. 2007) ("The problem involves two prisoners who are being held apart from each other after being arrested in connection with a crime. Separately they are questioned. If both prisoners confess they will receive sentences of five years. If neither confesses they will receive sentences of two years. Finally, if one confesses and the other does not, the confessor will be given a one year sentence and the prisoner choosing not to confess will be sentenced to 10 years. Without cooperation, each party will assume that the other will act selfishly and try to save his own skin. The result will be that each will confess and receive a sentence of five years.").

undercut by the competitors who invested proceeds in other critical necessities, such as upgrading processing equipment, courting individual raw milk providers and expanding distribution chains. Since the government granted all of the six processors quality exemption status,[76] no one had any incentive to enforce rigorous quality control when they collected raw milk from individual dairy farmers through milk stations.[77] In other words, milk processors who strived to increase raw milk quality would likely lose ground in the raw milk market to other competitors. As a result, consumers who had limited knowledge and control in the milk market were the victims of furious competition. In such an unregulated market, the milk scandal was inevitable.[78]

## II. THE SANLU GROUP AND THE TAINTED MILK SCANDAL

### *A. Sanlu's Cover-up*

On September 17, 2008, the police arrested Sanlu's former Board Chairwoman and general manager, Ms. Tian Wenhua, and other managers in response to the scandal.[79] The criminal trial of Ms. Tian and her associates received immense attention from the media both at home and abroad. Through testimony at trial, the story of how Sanlu concealed information about the tainted milk gradually came to light.[80]

As early as December 2007, Sanlu had received a number of consumer complaints from parents who found a red substance in their babies' urine, after feeding them Sanlu formula, and about some babies who were hospitalized.[81] Sanlu apparently gave no serious attention to the problem until March 2008, when a flood of consumer complaints claimed that its formula had caused

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[76] Qing, *supra* note 24.

[77] *Id.*

[78] Zhang, *supra* note 37.

[79] Yang Shouyong & Dong Zhiyong, *Sanlu Jituan Dongshi Zhang Tian Wanhua Bei Xingshi Juliu* [*Ms. Tian Wenhua, the Chairwoman of the Sanlu Group Arrested*], XINHUA NEWS, Sept. 17, 2008.

[80] Ye, *supra* note 59. To date, this article is the most detailed report on Sanlu's cover up.

[81] *Id.*

babies to suffer urinary and kidney diseases.[82] Ms. Tian then ordered a special inspection team to look into the matter. A month later, the inspection team confirmed that Sanlu baby formula contained high levels of "non-protein nitrogen," up to six times that of competing products. Ms. Tian began to suspect that the so-called "non-protein nitrogen" stemmed from melamine, the same chemical involved in the 2007 pet food scandal in the United States.[83]

Realizing the seriousness of the situation, Ms. Tian and other managers decided to send samples of formula to several outside agencies for further inspection.[84] On July 24, 2008, Sanlu sent sixteen batches of baby formula to the Hebei Frontier Inspection and Quarantine Bureau (HFIQB).[85] All of the samples were submitted under fake brand names in order to conceal their true identity. The level of melamine found in fifteen samples shocked HFIQB officers, who later testified that the tainted milk would cause serious health problems even in animals.[86]

By the time the HFIQB's findings confirmed Ms. Tian's suspicion, further complaints had overwhelmed Sanlu.[87] A great number of children had been hospitalized and there was one reported death. On the night of August 1, 2008, Ms. Tian called for an urgent executive meeting, which included marketing managers. Board directors from New Zealand's Fonterra Group proposed issuing an instant recall of the products, but many Sanlu managers refused because they believed that a recall would seriously damage Sanlu's reputation.[88] During the meeting, the managers passed two resolutions:[89] first, Sanlu would quietly replace the tainted formula with new product, instead of

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[82] *Id.*; *see also Bannian Qian Jiuyou Tousu Sanlu Yinman Bubao* [*Sanlu Covered Up Consumer Complaints Filed Six Months Before the Scandal Broke Out*], CHENGDU SHANGBAO, Sept. 14, 2008.

[83] Ye, *supra* note 59.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*; *see also* David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

[89] Ye, *supra* note 59.

issuing an open recall; and second, all participants would strictly keep the information secret, to avoid a leak of embarrassing information during the imminent Beijing Olympics (held August 8–24, 2008). Furthermore, at the meeting it was decided that references to melamine would be coded as "Substance A" in order to ensure secrecy.[90]

In hindsight, not issuing a recall had devastating consequences. However, even if Sanlu had successfully carried out its quiet replacement plan, it would have still saved many children from sickness and several others from dying. Unfortunately, this plan did not succeed. In the beginning, Sanlu did take some potentially beneficial actions. For example, Mr. Hang, a department manager, sent contaminated raw milk to another Sanlu department to make yogurt, probably because they believed that most yogurt consumers were adults who might not be as vulnerable as infants to the damage of melamine.[91] A few days after the urgent meeting, however, Sanlu found it impossible to replace all the tainted formula with qualified products, especially with the dramatically increased demand for milk on the eve of the Mid-Autumn festival and the National Holiday. Sanlu simply did not have enough appropriate substitutes.[92]

On August 13, 2008, Ms. Tian called another urgent meeting to discuss whether Sanlu should continue to sell the baby formula, which all of the managers clearly knew contained a high level of melamine.[93] Referencing a European standard that allegedly allowed up to twenty milligrams of melamine per kilogram in food products, the managers decided to release the products with a relatively lower level of melamine under a self-imposed standard of fifteen milligrams.[94] Even then, Sanlu could not enforce its self-imposed standard because of the record high demand for its products. From August 2 to September 12, 2008, Sanlu produced 904 tons of baby formula tainted with

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[90] *Id.* Mr. Wang, a department manager, later testified that melamine was referred to as "Substance A" in all of the internal documents after the urgent meeting. *Id.*

[91] *Id.*

[92] *See* Wang Huishi, *Sanlu Yinman Zhenxiang Dongshi Zhang Bei Mianzhi* [*Sanlu Covered Up the Tainted Milk, the Chairwoman of the Board Dismissed*], SING. LIANHE ZHAOBAO, Sept. 17, 2008.

[93] Ye, *supra* note 59.

[94] *Id.*

high levels of melamine in 72 batches, and sold 69 batches, representing a total of 813 tons for 47,560,000 Yuan (U.S $6.8 million). According to the *New York Times*, "in September, some Sanlu products were found to have over 2,000 milligrams of melamine per kilogram."[95]

When the police detained Ms. Tian and three other managers on September 17, 2008, they were charged with producing and selling fake or substandard products and producing and selling poisonous food in violation of the Criminal Law of China.[96] At trial, however, the public prosecutor dropped the latter charge, which carried the possibility of the death penalty. Experts believed that the prosecutor did so because pursuing the death penalty would require meeting a higher burden of proof. Disappointed with the prosecutor's move, some commentators insisted that the managers should be executed.[97]

At trial Ms. Tian admitted that she and other Sanlu managers deliberately concealed information about the melamine tainted products.[98] Faced with mounting evidence, the defense lawyers nevertheless made the following arguments in support of Ms. Tian: First, the relevant laws and regulations did not prohibit the use of melamine, therefore, Sanlu did not have an obligation to check melamine content.[99] Second, Sanlu did not have the requisite intent to add melamine to its milk products because the milk collectors and raw milk producers were the

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[95] David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

[96] Zhonghua Renming Gonghe Guo Xing Fa [The Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong. Mar. 14, 1997, effective Oct. 1, 1997), *translated in* LAWINFOCHINA (last visited Aug. 29, 2009) (P.R.C.); *see also* Nanfang Baoye, *Sanlu Baoguang Qian Shiyue Jiemi, Cengxiang Jiance Jiguo Yinman Dunai Laiyuan* [*Sanlu Covered the Sources of Tainted Milk Ten Months Before the Scandal Came to Light*], NANFANG RIBAO, [NANFANG DAILY], Jan. 8, 2009.

[97] Yinggai Pan Tian Wanhua Sixing [Ms. Tian Wenhua Should be Executed], *available at* http://www.neweekly.com.cn/BBS/showthread.php?t=819 (last visited Aug. 29, 2009) (stating that the public would not be satisfied if Tian were to be charged under Article 140 of the Criminal law, which did not carry the death penalty); *see also* posting of Qixiniao, Sanlu Qian Dongshi Zhang Tian Wenhua Ruguo Beipan Sixing [If Ms. Tian were Executed], http://blog.huanqiu.com/?uid-52122-action-viewspace-itemid-50123 (Dec. 27, 2008, 21:09) (arguing that execution of Tian would mark the end of the flawed food safety system).

[98] Barboza, *supra* note 95.

[99] *See* Ye, *supra* note 59.

ones who introduced the chemical to deceive quality control. Third, after learning the milk contained melamine, Sanlu planned to take all measures necessary to find the source and implemented a series of measures to contain the spread of tainted milk (albeit steps that were not successfully carried out); and finally, Ms. Tian made two reports, on August 2 and August 29, 2008, to the local government, and the local government failed to take any action to deal with the crisis. On January 1, 2009, the trial court sentenced Ms. Tian to life imprisonment and the other managers to fixed terms of imprisonment.

### *B. Laws Disregarded*

Based on what has been disclosed, Ms. Tian clearly did not consider the legal consequences of her decision to conceal the milk contamination. Indeed, legal counsel was not even present at Sanlu's emergency meetings. One might wonder if any laws obligated Ms. Tian to make the contamination public and issue an instant recall or should have at least compelled the local government to make a public announcement of the tainted products. As a matter of fact, China has a body of laws imposing serious legal penalties on both manufacturers that produce tainted foods and government officials who conceal information about poisonous food products.

#### 1. The Criminal Law of the People's Republic of China (as amended in 2006)[100]

The Criminal Law has several provisions that impose severe criminal sanctions on producers and sellers that produce counterfeits or substandard products causing serious bodily injuries or death. For example, Article 140 prohibits the production of adulterated products as well as the sale of counterfeits as genuine products, substandard products as good products, or unqualified products as qualified ones. For producers who violate this law, with sale amounts exceeding 2 million Yuan (U.S. $ 280,000), it mandates sentences of fifteen years of fixed-term

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[100] *See* Criminal Law, *supra* note 96.

imprisonment or life imprisonment. In addition, it imposes a fine of either fifty percent to twice the sale amount or a confiscation of total illegal proceeds.[101]

Similarly, Article 143 imposes criminal sanctions on producers and sellers of foods that do not conform to hygienic standards. For substandard products that cause food poisoning accidents or other severe food-borne diseases, the responsible parties face mandatory sentences ranging from several years of fixed-term imprisonment up to life imprisonment, depending on the severity of the circumstances. They may additionally face a fine of up to twice the sale amount. [102]

Finally, Article 144 prescribes the most severe criminal punishment for producing adulterated foods. It applies to pro-

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[101] *See id.* art. 140

Any producer or seller who mixes up or adulterates products, sells counterfeits as genuine products, sells substandard products as good products, or sells unqualified products as qualified ones, with a sale amount of not less than 50,000 yuan and not more than 200,000 yuan, is to be sentenced to not more than two years of fixed-term imprisonment or criminal detention and may in addition or independently be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 200,000 yuan and not more than 500,000 yuan, is to be sentenced to not less than two years and not more then seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 500,000 yuan and not more than 2 million yuan, is to be sentenced to not less than seven years and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than two million yuan, is to be sentenced to 15 years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the same amount or confiscation of property.

[102] *See id.* art. 143

Whoever produces or sells food that does not conform with hygienic standards, which sufficiently gives rise to food poisoning accidents or other severe food-borne diseases, is to be sentenced to not more than three years of fixed-term imprisonment and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious harm to human health, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the circumstances are particularly serious, to be sentenced to not less than seven years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

ducers and sellers of foods mixed with poisonous or harmful non-food materials. Under this article, committing the act itself calls for a sentence of not more than five years of fixed-term imprisonment. If the act gives rise to serious harm to human health, the sentence must be no less than five years and no more than ten years. If the adulterated products cause serious bodily harm or death, however, the sentence can be the *death penalty*.[103]

### 2. The Product Quality Law of the People's Republic of China (Amended as 2000)[104]

The Product Quality Law also includes provisions for criminal sanctions as well as administrative fines and victim compensation. Article 32 prohibits the production or sale of adulterated products, counterfeits, shoddy products, or substandard products.[105] Article 33 mandates that sellers inspect products

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[103] *See id.* art. 144

> Whoever produces or sells food that is mixed with poisonous or harmful non-food materials, or knowingly sells such things, is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious food poisoning accidents or other serious food-borne diseases and giving rise to serious harm to human health, the sentence is to be not less than five years and not more than ten years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing death or particular harm to human health, is to be punished in accordance with article 141 of the law.

*See also* art. 141

> Whoever produces or sells fake medicines which are sufficiently able to seriously endanger human health . . . causing death or particular harm to human health, is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment, or death penalty and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

[104] Zhonghua Renmin Gonghe Guo Chanpin Zhiliang Fa [The Product Quality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 8, 2000) *translated in* LAWINFOCHINA (last visited Aug. 30, 2009) (as literally translated in LAWINFOCHINA database it means "products liability law").

[105] *See id.* art. 32 ("Producers shall not adulterate their products or pose fake products as genuine or shoddy products as good or substandard products as standard.").

and verify product quality.[106] As penalties for producing adulterated products, Articles 49 and 50 require a stop of production and confiscation of illegal proceeds. In addition, fines may be imposed for more than fifty percent of but less than three times the sale amount and, for serious circumstances, the revocation of the producer's business license. For cases serious enough to constitute a crime, these articles require criminal investigation.[107]

With regard to compensation, Article 44 provides that, when defective products cause bodily injury, the producer is liable for medical care expenses and lost earnings due to absence from work. Mandated compensation also includes living expenses for the injured party's dependants, if the defective product left the victim disabled, and funeral and living expenses of the decedent's surviving dependants, if the defective product caused death.[108]

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[106] *See id.* art. 33 ("Sellers shall implement the system of examination and acceptance of goods procured, verifying the product quality certificates and other marks.").

[107] *See id.* art. 50

> If a producer or a seller is found adulterating their products or posing fake ones as genuine, inferior ones as superior, or sub-standard ones as standard, it shall be ordered to stop production or sale; the products illegally produced or sold shall be confiscated and a fine of more than 50% of but less than three times the value of the products illegally produced or sold shall be imposed; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; if the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

*see also* art. 49

> An enterprise producing products that do not conform to the state standard or the specific trade standard for ensuring physical health and the safety of the human body and property shall be ordered to stop production and sale; the products illegally produced and sold shall be confiscated; a fine less than three times the value of the products illegally produced or sold shall be imposed upon the producer or seller; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; If the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

[108] *See id.* art. 44

> If bodily injury is caused by the defect of products, the party responsible shall pay for medical expenses and nursing expenses during medical treatment and the lost income due to absence from work; if the bodily injury has resulted in disability, the party responsible shall also be responsible for the expenses for self-supporting equipment, living allowances, compensation of the disabled

3. Provisions on the Administration of Food Recall of 2007

In recent years, China has been plagued with massive food poisoning incidents. For example, on March 19, 2003, in Haicheng City, 2556 elementary students became ill after drinking the school district's designated soy milk. Over 100 students were hospitalized and one died. Local officials did not report the incident to the central government, as the law required, until parents contacted the media twenty-six days later.[109] Despite the government's pledge to improve food safety, there has been no sign of improvement. In 2006, the Ministry of Health reported nearly 200 incidents of school food poisoning, which sickened 6613 students and caused one death.[110] Against this backdrop, the General Administration of Quality Supervision, Inspection and Quarantine (the QSIQ) issued the *Provisions on the Administration of Food Recall* (hereafter the *Recall Provisions*) on August 27, 2007.[111]

According to the *Recall Provisions*, a food producer must keep a complete record of its food production process. Once the food producer knows or has reason to know that its products may pose a health hazard to consumers, it must promptly assess food safety and submit a report to the local QSIQ.[112] The food producer is required to report safety issues for its products to

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person and the living expenses necessary for those under the support of the disabled person; if death has resulted, the party responsible shall pay for the funeral expenses, compensation, and the living expenses necessary for those supported by the dead; if the defect of product causes losses in property of the victims, the party shall be responsible for restoring or compensating for it; if the victims sustain other major losses, the party responsible shall compensate for the losses.

[109] Chen Lei, *Haicheng Dounai Shijian Zhongdu Xuesheng Jiazhang Lianhe Jinxing Qianren Susong* [*Affected Parents of the Haicheng Food Poison Incident Brought a Class Action*], WAITAN HUABAO, Feb. 3, 2004.

[110] *Weisheng Bu Guanyu 2006 Nian Quanguo Shiwu Zhongdu Baogao Qingkuang de Tongbao2007[77hao]* [*The Ministry of Health's Annual Report on Food Poisoning Incidents for 2006, The Ministry of Health Report 2007-No. 77*], May 16, 2007, *available at* http://61.49.18.102/newshtml/18966.htm (last visited Jan. 9, 2010).

[111] Shipin Zhaohui Guanli Tiaoli [The Provisions on the Administration of Food Recall](promulgated by State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), Aug. 27, 2007, effective Aug. 27, 2007), *translated in* LAWINFOCHINA (last visited Aug. 30, 2009).

[112] *See id.* art. 13-14.

the local QSIQ, including consumer complaints.[113] The food producer must cooperate with the local QSIQ's investigation and assessment. The assessment must be made as to one of three categories of food product recall: (1) a category I recall when the suspected products may cause serious bodily injuries or even death, or otherwise involve incidents with a large social impact; (2) a category II recall when the suspected products may cause a health hazard but with a moderate social impact; or (3) a category III recall when the suspected products may cause a moderate health hazard.[114] The food producer may opt to voluntarily perform a recall by stopping production on the same day it reports the food contamination, and by making a public announcement. For a voluntary recall, the producer must report a detailed plan to the local QSIQ within three days. Alternatively, the State QSIQ will order a mandatory recall.[115] Notably, the *Recall Provisions* set forth various sanctions for producers who refuse to issue a recall or conceal information about unsafe products.[116]

### 4. Laws on Public Health Emergencies

In addition to product safety laws, China has developed a series of laws that impose penalties on government officials for contributing to the creation of a public health emergency by providing false information to the government or concealing information from the government.

The Chinese legal and regulatory regime requiring information reporting related to public health risks took shape after China experienced several disastrous events. The first event that prompted the government to revamp its antiquated public emergency laws was the SARS (Severe Acute Respiratory Syndrome) epidemic in 2003.[117] This epidemic started in a small town in Southern China in November 2002. Since the SARS vi-

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[113] *See id.* art. 9.
[114] *See id.* art. 18.
[115] *See id.* art. 25.
[116] *See id.* ch. 4.
[117] *See generally* Chenglin Liu, *Regulating SARS in China: Law as an Antidote?* 4 WASH. GLOBAL STUD. L. REV. 82 (2005).

rus was extremely contagious and had no cure, the best way to combat the disease was through quarantine and isolation.[118] Unfortunately, the government initially concealed the relevant information for fear of damaging China's reputation and trade opportunities. As a result, the epidemic quickly gained momentum and erupted into an international health threat. The Chinese government was widely accused of covering up the outbreak.[119]

In April 2003, a new administration led by Mr. Hu Jintao took a transparent approach and openly launched a national campaign against the SARS epidemic.[120] As part of this campaign, both the Minister of Health and the Vice Mayor of Beijing were dismissed for covering up the outbreak.[121] The government also enacted a series of new laws. *The Regulations on Dealing with the Outbreak of Public Health Emergencies* (hereafter the *Health Regulations*) played a pivotal role in establishing an effective communications system during the SARS epidemic.[122] The *Health Regulations*, which remain in effect, provided a framework for the development of public emergency laws.

Major provisions of the *Health Regulations* define the reporting requirements. Article 19 provides that, if a public health emergency occurs, a provincial government that receives information of an epidemic has one hour to report it to the Health Ministry, which shall make a report to the State Council when it is of significant danger to the public. Article 22 prohibits any person from concealing, delaying, or falsifying a report of emergency information, or directing others to do so. Article 45 sets forth sanctions for any reporting violation, requiring the head of the department involved to take full responsibility for a failure to report. The penalties range from demotion to a lower administrative rank to outright dismissal, depending on the seriousness of the concealment. The article also leaves the door open

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[118] *Id.* at 83.

[119] *Id.* at 89.

[120] *Id.* at 93.

[121] *Id.* at 89.

[122] Tufa Gonggong Weisheng Shijian Yingji Tiaoli [The Regulation on the Urgent Handling of Public Health Emergencies] (promulgated by the State Council, May 9, 2003, effective May 9, 2003), *translated in* CHENGLIN LIU, CHINESE LAW ON SARS (2004).

for criminal charges to be filed against the head of a department, if late reporting exacerbates the emergency.[123]

The second event that contributed to the development of public emergency reporting laws was a widespread practice of falsely reporting mining accidents in order to avoid investigation and suspension of operations.[124] In a well-publicized accident, one of the shafts in the Fanzhi Mine exploded and killed thirty-eight workers. The owner forced victims' families not to disclose the real number of deaths and bribed a large number of local officials and eleven journalists to conceal information. After disposing of the bodies of the fallen workers in a remote region, the owner made an official report stating that there were only two casualties in the accident.[125] A local worker finally disclosed the scandal to the media several months later. Mine accidents are a major problem in China. In 2005, nearly 6000 miners died in various accidents related to flooding, fire, and explosions.[126] To prevent mining accidents, the government issued *The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents.*[127] Article 4 provides, "The accident reporting shall be timely, accurate and complete, and any entity or individual shall not delay, omit, falsify or conceal the reporting."[128]

In addition, the People's Congress passed the sixth amendment to *The Criminal Law of China.*[129] In order to impose sanc-

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[123] *See* Liu, *supra* note 117, at 95.

[124] Jiang Peng, *Kuangnan Fengkoufei An Jielu Zhe Cheng Meikuang Laoban Reng Yinman Zhenxiang* [*Hush-Money Whistle Blower Claimed that Coal Mine Owners Still Concealed the Truth*], XINWEN CHENBAO, Nov. 4, 2008.

[125] Liu Zheng, *Fanzhi Kuangnan Shuiluo Shichu Shigu Guocheng Zhenxiang Daba* [*Fanzhi Coal Mine Accident Investigation Report*], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Sept. 15, 2002.

[126] *Zai Kuangnan Zhong Shiwang de Renman* [*Remembering Those Who Died in Coal Mine Accidents*], CHINACITY.NET, Mar. 20, 2008, *available at* http://www.chinacity.net/8168/8781/8787/253982.htm (last visited Jan. 9, 2010).

[127] Shengchan Anquan Shigu Baogao He Diaocha Chuli Tiaoli [The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents] (promulgated by the State Council, Apr. 9, 2007, effective June 1, 2007), *translated in* LAWINFOCHINA (last visited Aug. 30, 2009).

[128] *Id.*

[129] Zhonghua Renmin Gonghe Guo Xing Fa Xiuzheng An (Liu) [Amendment to the Criminal Law of the People's Republic of China (VI)] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective June 29, 2006), *translated in* LAWINFOCHINA (last visited Aug. 30, 2009).

tions on officials who fail to report or make a false report of a public emergency, a new clause was added to Article 139, which provides:

> Where, after any safety accident occurs, if the person who is obligated to report fails to do so or makes a false report, so that the rescue of the accident is affected, if the circumstances are severe, shall be sentenced to fixed-term imprisonment of not more than three years of detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

In sum, China has sophisticated legal provisions that punish both food producers for making adulterated foods and government officials for concealing vital information that cause public health emergencies. The milk scandal demonstrated, however, that these laws were largely disregarded.

### *C. Profits above the Law: Reasons for Cover-up*

China's rich body of laws, imposing penalties on those who cause or exacerbate public emergencies by covering up vital information, have often been ignored for various reasons, sometimes with disastrous consequences. The tainted milk scandal is a case in point. As a result of Sanlu's cover up, numerous families suffered unbearable pain that will continue indefinitely. How could Sanlu not issue a recall? What choice of values or priorities made Sanlu put profits ahead of consumers' lives? Why did the local government knowingly conceal Sanlu's transgressions?

#### 1. Sanlu's Cover-up

In contemporary China, the pursuit of a robust gross domestic product (GDP), above all else, trumps laws that hinder economic growth.[130] After learning about the contamination, Ms. Tian had two possible options: either tell the truth or conceal it.

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[130] *See* Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the "Takings" Law in China*, 29 HASTINGS INT'L & COMP. L. REV. 1, 25 (2005).

Telling the truth, she clearly understood, would precipitate disastrous consequences for Sanlu. She did not have the courage to do that on the eve of the Beijing Olympics, a historical event that allowed no room for bad publicity. In addition, telling the truth would probably have doomed not only her political future but also Sanlu's reputation. Moreover, even if Ms. Tian's conscience had compelled her to reveal the information relating to the tainted milk, the government would most likely not have allowed her to do so. To a large extent, Ms. Tian just did what the government expected her to do.[131] When the executives from the Fonterra Group proposed a recall, both Ms. Tian and other Chinese board of directors and managers vigorously opposed it. So Ms. Tian opted for the second option of concealing the problem and quietly dealing with victims. In time, she may have reasoned, other events would likely distract the public's view and leave Sanlu unscathed. With her forty years of experience in the milk industry, Ms. Tian predicted that the odds of Sanlu surviving were great, as there was virtually no government oversight. In an environment where all corporations are judged solely by the standard of GDP, any other manager in Ms. Tian's position would have made the same decision. Indeed, Sanlu's debacle was not a surprise to the public in China. In the frequent and frantic pursuit of economic miracles, Sanlu was just another example of corporate greed producing unwanted consequences in China's chaotic marketplace. After all, many other industries had already been caught in similar scandals.[132]

### 2. Local Government's Cover-up

To an outside observer, it may be surprising that a local government in China would be eager to cover up a scandal caused by a private enterprise. This paradox cannot be fully understood without examining the relationship between govern-

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[131] Anthony Kuhn, *Parents Question Chinese Milk Compensation Plan*, NPR.ORG, Jan. 5, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=99002599 (last visited Jan. 9, 2010) ("Anne-Marie Brady is an expert on Chinese politics at the University of Canterbury in Christchurch, New Zealand. She says Tian was just following orders.").

[132] For more information regarding similar scandals in other industries, *see supra* Part III.A.

ment and business enterprises in China. Even though a market economy replaced a planned economy during the economic reforms of the 1980's, the influence of the socialist economic model has persisted.[133] While the government has withdrawn from oversight of the day-to-day operation of local industries, it still exerts a strong influence on them. In fact, the government has maintained various departments, corresponding to respective industries, with vice mayors or department chiefs tasked to provide guidance to their respective enterprises.

The ties between local government and enterprises have become mutually beneficial.[134] Enterprises depend on government for various advantages in areas such as land acquisition, infrastructure improvement, financial assistance, and favorable tax policies.[135] For example, to revitalize the milk industry after the milk scandal, local governments provided substantial financial aid to the milk producers.[136] In return for such support, local governments expect and rely upon local enterprises to increase local GDP. Since officials are judged by their ability to grow their local economies, the government takes all necessary measures to ensure the success of big enterprises. In some cases, local governments have instructed local courts not to enforce judgments from other provinces for the protection of local enterprises. The ties between enterprises and government officials have often been tainted with corruption. In Shanxi Province, for example, a number of local leaders, who were in charge of mine safety, actually held significant financial stakes in local mines with notorious safety records.[137]

Under China's centralized system, officials at each level of government are appointed by officials at the next highest level.[138] In theory, the Chinese Communist Party (CCP) nominates one candidate for each key post in the government and an

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[133] *See* Liu, *supra* note 130, at 7.

[134] *Id.*

[135] *Id.*

[136] Huang Shuhui, *Neimenggu 1 Yi Yuan "Zhengfu" fei Jiu Yili Mengniu Wending Naiyuan Jidi* [*Inner Mongolia Government Bailed Out Mengniu and Yili with 100 million to Stabilize Raw Milk Supply*], Dongfang Zhaobao, Sept. 26, 2008.

[137] *Meikuang Guangu Chezi "Anliu" Xongyong Yixie Guanyuan Mingche Anchi* [*Some Officials Still Secretly Hold Shares in Coal Mines*], XINHUA NEWS, Oct. 28, 2005.

[138] Liu, *supra* note 122, at ch. 3.

election is held in the People's Congress. In practice, except at the village level, all the elections are uncontested and the CCP's nominees are always confirmed. In fact, the Central Government has constantly changed provincial governors with no more than notification to the local People's Congress. As a result, local officials are only accountable to superiors at the next highest level of government instead of the local people. With local GDP, the overwhelming standard for assessing the performance of local officials, local governments focus only on economic growth.[139] To the local government in Shijiazhuang City, Sanlu was one of the largest sources of revenue. Therefore, local officials did whatever it took to protect local business. Furthermore, without a separate and independent entity to ensure compliance with the laws on transparency, the officials had every incentive to conceal the information.

The most effective way to have controlled and minimized the impact of the poisonous baby formula would have been to initiate an instant recall and truthfully relay accurate information to the public. Any delay was bound to cause further damage not only to the victims but also to Sanlu and the local government. Therefore, time was of the essence in containing the public health emergency. Like Sanlu, however, the local government took every measure to do just the opposite: conceal relevant information.

As stated, Sanlu twice reported the contamination to the local government in August 2008, but the government neither released the information to the public nor reported it to the central government until the scandal broke. While the internal communications between Sanlu and the local government remain a mystery, a post-scandal public apology was quite revealing. On September 30, 2008, Mr. Wang Jianguo, a government spokesman, issued a rare public apology to the victims and further explained the reasons for the failure to immediately report the problem to the central government.[140] First, Mr. Wang at-

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[139] *See* Liu, *supra* note 130, at 7.

[140] Dong Zhiyong, *Shijiazhuang Zhengfu: Sanlu Naifen Shijian Women You Buke Tuixie de Zeren* [*Shijiazhuang Municipality: We are Responsible for the Milk Scandal*], JINGJI RIBAO [THE ECONOMIC DAILY], Oct. 4, 2008.

tributed the failure to a lack of political sensitivity and a lack of consideration of people's health and safety.[141] Second, Mr. Wang said that the government was responsible for failing to fully appreciate the serious political consequences of a scandal and was not able to recognize the social and economic costs of the tainted milk.[142] On this point the government believed that, as long as Sanlu could improve quality, it could eventually restore the shattered image and regain public trust. Third, the local government believed in the paramount importance of Sanlu's high reputation in the national dairy industry and the large number of employment opportunities it provided to the city. Mr. Wang regretted that, because of the delay, the central government missed the opportunity to control the negative impact of the scandal.[143]

The apology, far from achieving its intended result, instantly drew immense public criticism. As pointed out by Zhang Qianfan, a prominent constitutional law expert at Beijing University, Sanlu was not only an important source of local revenue but also local political legacy.[144] The apology revealed that the local government's first reaction was how to help Sanlu avoid bad publicity and eliminate the negative impact of a scandal. If the government had made the information public when it was known in August, it could have protected the health of numerous babies. The government, however, was not willing to confront the reality. With all the means in its power, the government tried its best to conceal the news and deal with the victims in private. Another commentator, Mr. Shao, discerned that the apology was not actually directed to the victims but to the central government itself.[145] The real purpose of the apology was to beg forgiveness from those high officials with the authority to determine the political futures of local leaders.[146]

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Zhang Qianfan, *Yi Sanlu Naifen Shijian Weili: Shipin Anquan Libukai Meiti Jiandu* [*Sanlu as an Example: Media Reporting is Indispensable for Ensuring Food Safety*], NANFAN RIBAO, Oct. 7, 2008.

[145] Shao Jian, *Shijiazhuan Shi Zhengfu Jiujing Gai Xiang Shui Daoqian?* [*Whom did Shijiazhuang Government Owe an Apology?*], ZHUJIANG WANBAO, Oct. 3, 2008.

[146] *Id.*

### 3. Lack of Media Supervision

The compulsion for cover up can also be attributed to a lack of an independent media capable of playing the role of corporate and government "watchdog." Commenting on the Sanlu scandal, Professor Zhang Qianfan called for strong media supervision to force milk producers to attend to their social responsibilities.[147] The media in China, however, is unlikely to live up to this high expectation. According to a recent public survey published in the *China Youth Daily*, nearly fifty percent of those interviewed were not satisfied with the state media's coverage of the milk scandal and only about twenty percent had confidence in the media's ability to disclose accurate information and prevent cover ups.[148] A commentator observed that the state media seemed to do a better job in covering natural disasters, such as the Sichuan earthquake than in covering man-made disasters, such as the Sanlu scandal. Although it is true that Sanlu collapsed because of a news report that identified Sanlu as the primary source of the tainted milk, nevertheless the news came too late to prevent harm to the public.[149] According to many experts, numerous children could have been saved if the media had reported on this major health threat several months earlier, during or before the Beijing Olympics. As early as July 2008, Mr. He Feng, a journalist of *Nanfang Daily*, interviewed a large number of families whose children were injured by the tainted milk and the doctors who treated them. He confirmed that all of the products were from Sanlu. Unfortunately, Mr. He was not permitted to release the report because of a high order from the government's Central Propaganda Department.[150]

Many examples illustrate how local governments frequently pressure the media to not report critical information. In a well publicized case, a *Legal Daily* news report criticized a county government for its decision to take private property and hand it

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147 *See* Zhang, *supra* note 144.
148 *Id.*
149 *Id.*
150 *Id.*

over to another private owner.[151] Irritated by the report, Mr. Zhang, secretary of the CCP committee of Xifeng County, Liaoning Province, sent the County Propaganda director to the *Legal Daily's* office in Beijing demanding that the *Legal Daily* retract the report because it damaged the county's image. After being refused, Mr. Zhang sent several local police officers with an arrest warrant to the *Legal Daily*, intending to arrest the journalist who produced the report.

In China, corruption has tainted the journalism profession as much as the troubled industries on which they should be reporting. Historically, corporations commonly manipulated news reports with "hush money." In the mine accident cases, mine owners customarily bribed journalists not to speak out. Shortly after the Ganhe Coal accident, the mine owner handed out stacks of cash to both journalists and local officials during fallen workers' funerals. Allegedly, Sanlu paid RMB 3 million Yuan (U.S. $430,000) to Baidu.com, the most popular search engine in China, to delete negative reports about Sanlu's products. If the allegation proves to be true, it was certainly a reprehensible move to stifle the media.[152]

## III. THE GOVERNMENT'S HANDLING OF THE CRISIS, COMPENSATION AND LITIGATION

The Chinese Government has faced several catastrophic events in recent years and gained great experience in dealing with crises. Soon after the tainted milk scandal came to light, the State Council called an urgent meeting in which Premier Wen Jiabao set forth a series of measures to deal with the public

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[151] Liu Wanyong, *Fumian Baodao Sheji Xianwei Shuji Liaoning Xifeng Gongan Jinjing Zhua Jizhe* [*County Communist Party Chief Ordered Local Police to Arrest the Journalist in Beijing Who Produced a Negative Report on Him*], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 7, 2008.

[152] *See,* Shai Oster and Loretta Chao, *China Arrests 2 in Milk Scandal as Number of Sick Infants Rises*, WALL ST. J. Sept. 16, 2008, at A16; Joe McDonald, *China's Baidu.com Fights to Rescue Reputation*, BUSINESS NEWS, Nov. 20, 2008. *See also, Baidu's Role in Tainted Milk Scandal*, PEOPLE TO PEOPLE NEWS, Sept. 23, 2008, *available at* http://p2pnet.multibox.bc/story/17091 (last visited Dec. 14, 2009); *Leaked Memo Alleges Milk 'Cover-up'*, SUNDAY STAR TIMES, Sept. 27, 2008, *available at* http://www.stuff.co.nz/national/648766 (last visited Dec. 14, 2009).

emergency.[153] In sum, these measures had a two-fold purpose: (1) to remove the local leader and the quality control chief under the newly developed principle—"Resignation upon Taking the Responsibility"—in the hope of restoring public trust; and (2) to provide assistance to affected families and institute a government–controlled compensation scheme in order to maintain social stability.

### *A. Resignation upon Taking the Responsibility*

Since the SARS epidemic in 2003, the Central Government has instituted a policy called "Resignation upon Taking the Responsibility" (*yin jiu ci zhi*), to hold high officials accountable for major public emergencies. Most of the measures related to this policy have been subsequently codified in laws and regulations with the intent of creating a transparent and accountable government.[154] For example, Article 82 of the Civil Servant Law of the People's Republic of China provides:

> Where a leading member causes any serious damage or social impact due to his severe mistakes in work or breach of duty or bears the leading responsibility for any serious accident, he shall take the blame and resign his leading post.

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[153] *Guowu Yuan Huiyi Jueding Quanmian Jiancha Naizhi Pin, Zhengdun Naizhi Pin Hangye* [*The State Council Pledged to Step Up Dairy Product Inspections and Overhaul the Dairy Industry*], XINHUA NEWS, Sept. 17, 2008. The State Council mandated responsibility for handling the crisis on the heads of the governments at all levels. *Id.* It required all local governments to provide free medical services to affected children. *Id.* It charged the Ministry of Health to provide guidance in diagnosing and treating children sickened by the tainted milk. *Id.* It ordered the Quality Control Department to conduct a thorough inspection of all milk products on the market and to recall unqualified products. *Id.* The government promised to overhaul the entire milk industry and provide subsidies to dairy farmers to ensure an adequate milk supply. *Id.* In addition, it aimed to ensure milk quality and impose controls to prevent price gouging. *Id.* For accountability, it called for action to punish those who were responsible for the crisis and initiate a criminal probe into the scandal. *Id.* Additionally, it sought to provide guidance to news media to ensure accurate and prompt reporting and to probe the scandal. *Id.* Furthermore, it required all local governments to take necessary measures for maintaining social stability. *Id.*

[154] Xingzheng Jiguan Gongwuyan Chufen Tiaoli [Regulation on the Punishment of Civil Servants of Administrative Organs] (promulgated by the State Council, Apr. 22, 2007, effective June 1, 2007), *translated in* LAWINFOCHINA (last visited Aug. 30, 2009).

> Where any leading member shall take the blame and resign his post or is no longer suitable for a present leadership post but fails to apply for resignation by himself, he shall be ordered to resign the leading post.[155]

In the beginning, the public welcomed the government's apparent determination to clean up the scandal-laden bureaucratic system. Yet, when some resigned officials were later reappointed to high offices at different locations, the public rightly questioned the genuine purpose of the resignation system.[156] Internet bloggers sarcastically called it a system of "vacation with pay," referring to the full-fledged benefits that officials still enjoyed after resigning.[157] To the officials, a scandal was just a spell of bad luck after which they would make a comeback when the time was right. Critics also questioned the effectiveness of the resignation system and pointed out that it did not serve as a deterrent to prevent similar mistakes from occurring. Other critics pointed out that the current system focused disproportionally on the short-term sobering effect of the resignation at the time of crisis, rather than on long-term investigation, correction and prevention of bad practices.[158]

Officials who resigned in the wake of a public emergency have rarely been investigated for their wrongdoing. A scholar argued that the government had a responsibility not only to conduct a thorough, objective investigation, but also to make its findings available to the public.[159]

In practice, an official's resignation during a public emergency serves two pragmatic, but not necessarily noble,

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[155] *Id.*

[156] Zhang Zhixin, *Guanyuan Wenze Jiongjing Daijie* [*Unanswered Questions About the System of "Take the Responsibility and Resign"*], BAN YUE TAN, Oct. 15, 2008; *see also* Qing Feng, *Sanlu Shijian Fangfan Sheng Yu Wenze* [*Prevention is Superior to the System of "Take the Responsibility and Resign"*], THE CHINESE CIVIL AND COMMERCIAL LAW NET, Oct. 7, 2008, *available at* http://www.civillaw.com.cn/Article/default.asp?id=41153 (last visited Jan. 9, 2010).

[157] *See* Zhang, *supra* note 156.

[158] *Id.*

[159] Ji Weidong, *"Wenze" Yu Xingzheng Luocheng Touming Hua* [*"Take the Responsibility and Resign" Principle and Administrative Transparency*], THE CHINESE CIVIL AND COMMERCIAL LAW NET, June 5, 2008, *available at* http://www.civillaw.com.cn/article/default.asp?id=39101 (last visited Jan. 9, 2010).

purposes. First, it may quell demands for public inquiries that could implicate other officials connected to the scandal. In effect, the resignation provides temporary relief from public resentment and directs public attention to other issues, while tending to insulate the remaining officials from scrutiny. Second, resignation diminishes the potential for internal opposition to corrective measures that may be implemented by the current administration to address the crisis. However, although resigning officials no longer have an official voice in the debate, they often continue to receive full employment benefits and may even continue to work for the government elsewhere. On several occasions, resigned officials have later moved up the ladder in a different part of the bureaucratic system.[160]

Commenting on the Sanlu trial, some critics were surprised that the government conducted no legal investigation of the Shijiazhuang City Mayor who resigned during the scandal. Critics maintained that the officials who covered up the scandal should be prosecuted according to Article 397 of the Criminal Law of China, which provides:

> State personnel who abuse their power or neglect their duties, causing great losses to public property and the state's and people's interests, shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment. [161]

Just four months before the Sanlu scandal, the public had high praise for Premier Wen Jiabao's quick action and great relief efforts in response to the devastating earthquake in Sichuan Province. They, however, had a far different opinion of

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[160] *Id.*

[161] *See* Zuigao Renmin Jiancha Yuan Guanyu Duzhi Qianquan Fanzui An Li'an Biaozhun de Guiding [The Supreme People's Procuratorate Rules Regarding Admission Standards for Official Dereliction Cases] art. 1 cl. 7 (promulgated by the Supreme People's Procuratorate, Dec. 29, 2005, effective Dec. 29, 2005) *translated by* the author ("the prosecutors shall initiate a criminal investigation if an official abused his power and caused one or more deaths by concealing information, making a false report or directing others to do so.").

the government's role in dealing with the milk scandal. Because the tainted milk was purely a man-made disaster, many believed it could have been prevented if the government had increased supervision.

Despite the critics' strong call for a criminal investigation of the removed officials who concealed the information, the public can expect staunch government unwillingness to bring charges under the new amendment to the Criminal Law of China. Similarly, the local People's Congress will not likely conduct a public hearing and formal inquiry. The reason is that further investigation might implicate more officials and irrevocably jeopardize the public's already precarious trust in the government. Some commentators have criticized the State Council's measures on the ground that they only temporarily dealt with the crisis and did not provide the type of long-term solution needed to restore public confidence in the government. Professor Zhang Qianfan responded with breath-taking criticism:

> Today is not the age of the planned economy. Who believes that the average Joes are still dependent upon the government for living? No, they can depend on themselves. Why on earth do the average Joes need a government? . . . [I]f the government is incapable of assuming the responsibility for safeguarding food quality . . . China will face a crisis that could jeopardize the country's very existence. . . . We are heartbroken at Sanlu's greed, but we cannot forget to ask: where was the government before the scandal? Why did it only come to surface after the scandal erupted into a nationwide catastrophe?[162]

### *B. Litigation, Compensation and Social Stability*

After the scandal, many affected parents filed law suits with the local People's Courts seeking compensation. The courts declined to hear their cases. More than 100 lawyers offered free legal advice to affected parents, but local officials put pressure

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[162] Zhang Qianfan, *Zhengfu Bixu Baozhang Shipin Anquan [The Government Must Ensure Food Safety]* NANFANG DAILY, Sept. 27, 2008.

on them not to take on any cases involving the tainted milk. As a result, some lawyers withdrew their commitment.[163]

1. Government Controlled Compensation Scheme

In the United States, many lawyers would line up to provide representation to the victims of this type of disaster on a contingent fee basis. Suits would inevitably go forward, either individually or by way of class-action litigation. In contrast, in China, civil litigation has never been an option in mass tort cases.[164] For example, in 2004, a state owned fertilizer plant discharged synthetic ammonia and nitrogen into the Tuojiang River, a fresh water resource for several densely populated cities in Sichuan Province. The pollution not only left one million people without fresh water for nearly a month, but also caused serious damage to the fish farms along the river, which lost over one hundred million Yuan (U.S. $12 million) worth of fish. Similar to the Sanlu case, the top official in the fertilizer disaster took the blame and resigned. Two other lower level officials were criminally detained.[165]

For compensation, the government offered a one-time payment to the affected farmers, many of whom deemed the payment too small to accept. In order to prevent private litigation, the Justice Bureau of Ziyan City issued an order requiring all law firms not to represent clients seeking compensation for the losses due to the pollution. In another related case, the government directly instructed the court not to take the cases.[166] In 2003, the Guangxi High People's Court issued an internal circular which required local courts not to hear sensi-

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[163] Edward Wong, *Courts Compound Pains of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

[164] Wang Liming, Dean of the Renmin Univ. Sch. of Law, Zhongguo Renming Daxue Faxue Yuan Ju Xing Sanlu Wenti Zhuanjia Yantao Hui [Remarks at the People's University School of Law Special Conference on the Sanlu Scandal] (Oct. 10, 2008) (transcript available at http://blog.ce.cn/html/77/101277-225052.html).

[165] Lei Xiangpo, *Ziyang Sifaju Chu Hongtou Wenjian Buzhun Lushi Jie Tuojiang Wurang Guangsi* [*Ziyang Legal Department Issued Red Tape Preventing Lawyers from Taking Cases Involving Tuojiang River Pollution*], TIANFU ZHAOBAO, Sept. 24, 2004, *available at* http://www.people.com.cn/GB/shehui/1063/2805729.html (last visited Jan. 9, 2010).

[166] *Id.*

tive cases. The circular listed thirteen types of undesirable cases that the government believed could cause class actions and social instability.[167]

Instead of allowing civil litigation in response to the tainted milk scandal, the government again took a paternalistic approach by setting up a one-time compensation package totaling 1.1 billion Yuan (U.S. $160 million). Under the plan, families of children who died from drinking the tainted milk would receive 200,000 Yuan (U.S. $29,000). Those who suffered kidney stones would receive 2000 (U.S. $292); sicker children would be paid 30,000 Yuan (U.S. $4400). The compensation package would be paid by the twenty-two companies whose products were found tainted with melamine. A remainder of 200 million Yuan (U.S $29 million) would be used for future health problems that the afflicted children might develop.[168]

Like the fish farmers, the affected parents were excluded from the decision process, and many of them considered the compensation too low to accept. A group of parents set up a website—jishibaobao.com—to organize parents not to sign the compensation deal with the companies. Unsurprisingly, the concerted efforts caused the government to take precautions. On January 2, 2009, when the web creator and some other parents planned to give a press conference in the hope of soliciting support from the media, the police detained them.[169]

### 2. Social Stability Concern

The government did not allow civil litigation based on grave concerns over social unrest that an unfair judgment could spark. Those concerns were not unfounded. A report indicates that the number of public protests in China increased nearly ten

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[167] Liu, *supra* note 130, at 23-24.

[168] Zhu Zhe and Cui Xiaohuo, *22 Dairy Firms to Pay $160m in Compensation*, CHINA DAILY, Dec. 30, 2008, *available at* http://www.chinadaily.com.cn/bizchina/2008-12/30/content_7351824.htm (last visited Dec. 16, 2009).

[169] The Associated Press, *China: Parents in Milk Case Released*, N.Y. TIMES, Jan. 3, 2009, at A6.

times between 1993 and 2004.[170] Some public protests involved violent clashes between protesters and local police.[171]

Just six weeks before the Beijing Olympics, thousands of people, including middle school students, took to the streets in Weng'an County in southwest China.[172] They protested the official handling of the death of a local teenage girl, whose relatives blamed the local police for a shoddy investigation and possible corruption.[173] The angry protesters burnt government buildings and overturned cars. The government did not admit wrongdoing, however, the county governor resigned shortly after the riot.[174] In November 2008, residents of Longnan City in Gansu Province angrily protested a demolition and relocation order issued by the local government. The protesters burned buildings and cars. The incidents in Weng'an and Longnan triggered more protests elsewhere. Taxi drivers in several provinces went on strike demanding that the government take tougher action against illegal taxis. In the recent issue of *Liaowang Magazine*, three prominent reporters warned that China was likely to face more social unrest in 2009.[175] The article cautioned that any mishandling of sensitive issues could lead to massive social disturbance.[176]

While scholars understood the government's concerns for social stability, they were also concerned about the downstream effect of the government's actions. On the government's com-

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[170] Li Chaohai, Nong Mingong Jiti Xingdong Weiquan Yu Canjia Jiti Xingdong Pinlu de Yingxiang Yinsu Fenxi [An Analysis of Factors Affecting Rural Migrant Workers' Collective Action] (unpublished Ph.D. dissertation, State University of New York), *available at* http://mumford.albany.edu/chinanet/events/guangzhou09/paper/An%20Analysis%20of%20Factors%20Affecting%20Rural%20Migrant%20Workers%20Collective%20Action.pdf (last visited Jan. 9, 2010). Li's dissertation is the most comprehensive source of statistics about the occurrence of collective actions in China.

[171] *Id.*

[172] Luo Changping, *Guanfang Tongbao Weng'an Shijian Guocheng* [*Official Report on the Weng'an Incident*], CAIJING, July 1, 2008.

[173] *Id.*

[174] *Id.*

[175] Zhu Suzhen, *2009 Nian Keneng Chengwei Qunti Shijian Gaofa Nian* [*China is More Likely to Face More Social Unrest in 2009*], REUTERS NEWS, Jan. 6, 2009, *available at* http://cn.reuters.com/article/wtNews/idCNChina-3345820090106 (last visited Jan. 9, 2010).

[176] *Id.*

pensation package, Professor Wang Liming, Dean of the School of Law at Renming University, commented:

> [In dealing with massive torts], the government always takes all responsibility to compensate the victims. There are some advantages to this method, because it is efficient, especially when the situation is complicated and a large number of people are affected. Another advantage is that it could probably prevent even greater social conflicts. As a result, it might be conducive to social stability. However, [excluding individual affected families] might not be a good idea. By taking the responsibility for compensation, the government essentially uses taxpayer's money to redeem the enterprise's illegal behavior, which is debatable. . . . we have to find a legal solution. [177]

### 3. Technical Hurdles in Private Litigation

Even if the courts had been allowed to hear the tainted milk cases, many of the affected parents would not have relied on litigation. In fact, over 90% of the parents opted for government compensation and waived legal rights to sue the milk producers, despite considering the compensation inadequate.[178] The parents were reluctant to seek adequate compensation through litigation for several reasons.

First, the courts generally do not grant more compensation than the government because the courts exist as an integral part of the government, rather than as an independent branch.[179] Like other government officials, judges serve appointed five-year terms. In theory, the local congress appoints judges, but in practice the leader of the local government has the final say about reappointing or promoting judges. In addition, the government sets the courts' budgets and provides

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[177] *See* Wang, *supra* note 164.

[178] Reuters, *90pc of families take toxic milk deal, China says*, ABC News, Jan. 24, 2009, *available at* http://www.abc.net.au/news/stories/2009/01/24/2473662.htm (last visited Dec. 15, 2009).

[179] DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 198 (Thomson West, 2d ed. 2009) ("Article 123 of the PRC Constitution provides that the people's courts are the judicial organs of the state and are vested with the state's adjudicative powers. Unlike the US legal system in which the judicial branch is a co-equal branch of government, the people's courts are subordinate to the people's congresses at each level.").

logistical support. To rule against the government plan would not only result in inconsistent treatment of victims of the same conduct, but also would jeopardize the judges' political futures.[180]

Second, even if the parents received impartial treatment by the courts, tort law in China would fail to meet their expectations. Judicial compensation standards are extremely low.[181] Additionally, Chinese tort law has long avoided embracing the idea of punitive damages.

Critics have called for, or seriously considered, the adoption of punitive damages in the Chinese tort system. Indeed, some proponents have argued that the Chinese legal system already embraces a type of punitive damages in the area of consumer protection[182] and under other laws.[183] Article 49 of the Chinese

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[180] *Id.* at 197 ("In sum, judges are beholden to the people's congresses or governments for funding, staffing and have no security of tenure.").

[181] Yang Tao, *Guanzhu: Qiche Peichang Guodi 10% de Peichang Dengyu "Zhuangle Baizhuang"* [*Inadequate Compensation in Auto Accidents Resulted in Reckless Driving*], XINKUAI BAO, Nov. 5, 2007, *available at* http://auto.anhuinews.com/system/2007/11/05/001884611.shtml; *see also* Posting of Hao Zhijun, Peichang Biaozhun Guodi Nanbao Anquan Shengchan [Work Safety Concerns Because of Inadequate Compensation], Jan. 19, 2008, http://blog.cqnews.net/?43879/viewspace-48558 (last visited Jan. 9, 2010).

[182] Zhong Hua Ren Min Gong He Guo Xiao Fei Zhe Quan Yi Bao Hu Fa [The Law of the People's Republic of China on the Protection of Consumers' Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), translated in LAWINFOCHINA (last visited Aug. 30, 2009) (hereinafter "Chinese Consumer Protection Law").

[183] The Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses art. 8 (2003)

> In case of any of the following circumstances, which causes the purpose of a contract for the sale of commodity houses to be unable to be realized, the buyer who is unable to obtain the house may request the rescission of the contract, refund of the already paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of the house: (a) after the contract for the sale of commodity houses is concluded, the seller mortgages the house to a third person without notifying the buyer; (b) after the contract for the sale of commodity houses is concluded, the seller sells the house to a third person.

*id.* art. 9

> If, when concluding a contract for the sale of commodity houses, the seller is under any of the following circumstances which causes the contract to be invalid or cancelled or rescinded, the buyer may request the refund of the already

Consumer Protection Law provides, "Business operators found to have committed fraud in providing goods or services shall, as demanded, compensate the consumer with a sum doubling what the consumers have paid for such commodity or services."[184]

In many important respects, Article 49 differs significantly from the concept of punitive damages in the United States legal system. Article 49 bases the double payment on what the plaintiff paid for goods or services, not on the compensatory damages caused by the defendant. In the milk scandal, even if the affected families were allowed to recover double damages under Article 49, they could only be paid twice the amount they paid for milk powder, not twice the amount of their actual injuries. Thus, the so-called double damages provision does very little to punish wrongful conduct. In the United States, juries generally can award punitive damages "in cases involving egregious conduct to punish or make an example of the defendant."[185] Unlike compensatory damages, punitive damages operate as "private fines" intended to punish the defendant and to deter future wrongdoing. [186] Whereas compensatory damages redress the concrete loss caused by the defendant's wrongful conduct, punitive damages express the jurors' moral condemnation of such conduct.[187]

Taking advantage of Article 49, Mr. Wang Hai waged a private war against producers of shoddy and substandard products. He set up his own lab to inspect suspect products and employed other quality agencies to do so at his expense. Once he

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paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of houses: (a) the seller intentionally conceals the fact of not having obtained the certificate on permit of advance sale of commodity houses or provides false certificate on permit of advance sale of commodity houses; (b) the seller intentionally conceals the fact that the sold house has been mortgaged; (c) the seller intentionally conceals the fact that the sold house has been sold to a third person or is the house for compensation and resettlement due to demolishment.

[184] Chinese Consumer Protection Law, *supra* note 182.

[185] VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 213 (Carolina Academic Press 4th ed. 2009).

[186] *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

[187] *Id.*

obtained crucial evidence of a fraudulent product, Mr. Wang would file a lawsuit against its maker seeking the double payment award. In many instances, Mr. Wang bought products that he clearly already knew were counterfeit and filed subsequent lawsuits against the producers. While many scholars supported Mr. Wang's practices, some were disturbed. They claimed that the only goal of Mr. Wang's efforts was personal enrichment, and some were convinced that Mr. Wang himself had engaged in fraudulent practices for which he should be prosecuted. Mr. Wang's self-imposed role as private prosecutor was well received by the public, but not by the government because he encroached upon their authority and caused public mistrust of the government. Consequently, Mr. Wang soon found that courts would no longer hear his cases.[188]

In light of the tainted milk scandal, critics once again raised the issue of whether punitive damages should be imposed on sellers of defective products. Opponents, however, argued that punitive damages are not suitable in the Chinese legal system.[189] They maintained that the primary purpose of tort law is to compensate the victim, not to punish the perpetrator; that punitive damages fall within the realm of criminal law, not tort law; and that, because of a difference in the burden of proof applicable in civil and criminal cases, the civil legal system lacked procedures needed to protect defendants' rights. Opponents were also concerned that punitive damages would impose an undue burden on business operators, thus hindering economic development. Additionally, if punitive damages were imposed, they believed that producers would rely upon insurance to pass the costs of punitive damages back to consumers. Finally, they theorized that a system allowing punitive damages could spawn frivolous lawsuits, waste judicial resources, create moral hazards, and result in unjust

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[188] *See* Cui Guangping, *Lun <<Xiaofeizhe Quanyi Baohu Fa>> de Jiazhi he "Wanghai" Xianxiang de Falu Shiyong* [*Comments on the Value of the Consumer Protection Law and Its Application in the "Wang Hai" Case*], *available at* http://www.lunwentianxia.com/product.free.7825967.1/ (last visited Jan. 9, 2010).

[189] Zhou Bin, *"Huang Jing An" Yifa Xiaofeize Weiquan Sikao, Chengfaxing Peichang You Duo Yuan* [*A Valuable Lesson Learned from the Huangjing Case: Is the Chinese Tort System Likely to Embrace Punitive Damages?*], FAZHI RIBAO [THE LEGAL DAILY], Dec. 11, 2008.

enrichment of consumers. For these reasons, it remains unlikely that the government will incorporate the concept of punitive damages into Chinese law any time soon.

Instead of allowing for private litigation with punitive damages, the government would prefer to set up a fine-only system.[190] Shortly after the milk scandal, the State Council issued the Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products.[191] Article 57 stipulates that a dairy product seller in violation of the regulation, that does not stop selling or does not recall substandard dairy products which may harm human health and safety, or the growth of infants, would be subject to a fine of up to fifteen to thirty times the value of the illegal dairy products and have its license revoked. [192]

Professor Wang has pointed out that administrative fines would not likely achieve the same level of deterrence as punitive damages.[193] Moreover, local governments know that the shattering of economic enterprises that would be caused by heavy fines and license revocation would directly reduce tax revenues and impede local economic development. Realistically, given the close ties between the local milk companies and local governments, administrative fines might not be imposed for fear of damaging the reputation of local industry, regardless of whether the law was violated.

## CONCLUSION

The milk scandal centered on melamine additives because that chemical quickly injured or killed infants. On record, melamine tainted milk has sickened nearly 300,000 infants and children, six of whom died. So far, there have been no reported cases of illness or death involving adults, but that does not mean that milk tainted with high doses of melamine is safe for

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[190] *See* Wang, *supra* note 164.

[191] Guowuyuan: Ruye Zhiliang Anquan Jiandu Guanli Tiaoli [State Council: Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products] (promulgated by the St. Council, Oct. 6, 2008, effective, Oct. 6, 2008).

[192] *Id.*

[193] *See* Wang, *supra* note 164.

adults. Compared with infants, the food intake of adults is much more diverse; therefore, it is considerably more difficult for adult consumers to prove a causal link between their illnesses and melamine, even if they suffered kidney problems. For this precise reason, the government-controlled compensation plan specifically excludes adults.

Problems other than melamine adulteration continue to plague the dairy industry in China. One commentator cautioned, "melamine is just the tip of the iceberg."[194] Milk processors have routinely used numerous questionable additives, both legal and illegal alike, including excessive antibiotics, growth hormones, pesticide residues, preservatives, and color agents. Unlike melamine, no one has scrutinized these substances because their detrimental effects have not been as instantly destructive. As a result of the milk scandal, a number of consumers have given up consumption of dairy products altogether. A survey indicated that 8% of consumers refuse to allow their children to drink milk. As a precaution, many consumers have switched to dairy substitutes.[195] Under the same regulatory regime, however, who can be sure that the substitutes are safer than milk? And what about similar implications in the larger food safety context? Dairy product processing only accounts for a small fraction of the food industries in China. Yet, as long as massive illnesses are not associated with a single brand, food industries will continue to conduct "business as usual." Unless the government conducts a complete overhaul of the food supervision system, chances are the same type of scandal will strike again.

Objectively, a tragedy like this one offers a rare opportunity for the government to examine its regulatory regime and make necessary changes. The government's measures during the crisis, however, fell far short of public expectation. First, the so-called "take the responsibility and resign" principle lost its credibility because the government did not initiate criminal

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[194] Susan Thixton, *Melamine May Be Just the Tip of the Iceberg*, NATURALNEWS.COM, *available at* http://www.naturalnews.com/025017.html (last visited Jan. 9, 2010).

[195] Zheng Xue, *Qicheng Ren Jianyi QuxiaoWenti Naifen Qiye Chimin Shangbiao Chenghao* [Seventy Percent of Consumers Surveyed Called for Abolition of So-Called "Well-Known Trademarks"] HENAN SHANBAO, Sept. 25, 2008.

investigations against the removed officials and the public felt deceived when the disgraced officials were quietly reappointed to other government posts. Second, the government-controlled compensation plan drew heavy criticism by not considering the affected families' expectations. Most of the families found the compensation amounts unacceptably low and disproportionate to the harm they suffered. Since the government instructed courts not to take cases involving victims of the milk scandal, the families were left with no adequate remedy for justice. Thirdly, to revitalize the milk industry after the scandal, the government generously injected capital to save the local firms. In the public's eye, this action sent the completely wrong signal to the entire industry. The fall of the milk industry was entirely its own fault; therefore, the government's financial assistance could only serve to embolden the industry's disregard for people's health and safety.

In theory, the government should be able to rely on market forces to induce milk processors to internalize the cost of doing business in order to provide quality goods. Yet, as stated in Part I, competition does not necessarily ensure product safety. To the contrary, competition in the unregulated milk market actually caused a relaxation of quality controls with costs passed on to consumers. Without properly structured and enforced regulation in place, a milk processor has no incentive to incur costs in building its own dairy farms while competitors undercut its market by processing milk from individual dairy farms at a lower cost. To solve the problem in the long run, the government should require that a high percentage of raw milk must come from milk processors' own dairy farms. In essence, the government should raise the bar for the milk processing industry across the board. If milk processors bear the costs for operating and maintaining dairy farms as a requirement of staying in the market, it would provide an infrastructure for enabling significant improvement in the control of milk quality and safety. Only in such a regulated market will competition among milk processors truly benefit consumers.

To further ensure milk quality, the government should realize that private litigation can complement regulatory supervision and remedy loopholes in the government's

regulations. Without the possibility of consumer litigation to address food safety issues, there is little incentive for milk processors to correct their problems, given their close governmental ties. Despite the judicial system's present inability to adequately address compensation issues, the ability of injured persons to file lawsuits could offer an effective mechanism for providing redress for harm caused by dangerous products and deter misguided production processes. Moreover, trial proceedings would shed light on processors' hidden but dangerous practices. Private litigation would also force milk processors "to examine harmful practices that might otherwise receive inadequate attention."[196] In essence, litigation would compel milk producers to internalize the costs of doing business and take precautions long before problems arise.

Understandably, in China, government concerns about social stability underlie fears relating to private litigation. However, these fears are largely misplaced. Contrary to the government's belief, private litigation is a social safety valve, enabling aggrieved consumers to redress their wrongs in a civilized manner.[197] Without litigation, victims of injuries caused by tortious acts are prone to resort to violence.[198] In reality, private litigation can actually reduce pressure on the government by providing a structured mechanism for airing grievances, obtaining compensation, and holding malefactors responsible for injurious practices. Litigation is not a threat to social stability, but rather an orderly process for avoiding the types of institutional unaccountability that threaten to generate challenges to social order. The government should also realize that the availability of remedies through private litigation can be conducive to social stability.

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[196] Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L. J. 655, 671 (2007).

[197] *See id.* at 671.

[198] *Id.*

# THE INTANGIBLES OF PAYMENT STREAM STRIPPING: WHY ARTICLE 9 SHOULD NOT LEAVE YOU BARING YOUR ASSETS (APPLYING A COMMON LAW REMEDY TO A CREATURE OF STATUTE)

*David P. Weber**

*"Take away the motive and you take away the sin."*[1]

## INTRODUCTION

Imagine purchasing a new car, and then, moments after its delivery, discovering the vehicle's engine was not included. As unlikely as the scenario may seem, purchasers of equipment leases may find themselves in a similar situation. For example, assume Leasing Co. is in the business of leasing heavy construction equipment. In order to maintain liquidity, Leasing Co. sells the rights to the lease payments to a third party, Investor Co. In this transaction no other documents, such as a promissory note, are given as security. Investor Co. has purchased the interests and therefore begins to receive the monthly payments. Leasing Co. may or may not continue acting as the servicer of the leases. Under Article 9, Investor Co.'s interests in the stripped payment streams are automatically perfected, and therefore it does not need to take possession of the leases nor file a financing state-

* Assistant Professor at Creighton University School of Law. The author wishes to thank Professors Marianne Culhane and Terry Anderson for their time, insights and helpful suggestions throughout the drafting process, as well as Rob Stark for researching more about the intricacies of Article 9 than he ever wished to know.

[1] Miguel de Cervantes Saavedra *quoted in* CUYLER REYNOLDS, THE BANQUET BOOK: A CLASSIFIED COLLECTION OF QUOTATIONS DESIGNED FOR GENERAL REFERENCE, AND ALSO AS AN AID IN THE PREPARATION OF THE TOAST LIST, THE AFTER-DINNER SPEECH, AND THE OCCASIONAL ADDRESS; TOGETHER WITH SUGGESTIONS CONCERNING THE MENU AND CERTAIN OTHER DETAILS CONNECTED WITH THE PROPER ORDERING OF THE BANQUET 77 (1902); also translated, "Take away the cause, and the effect ceases." Miguel de Cervantes Saavedra *quoted in* JOHN COOK, THE BOOK OF POSITIVE QUOTATIONS 440 (Steve Deger & Leslie Ann Gibson eds., Fairview Press 2d ed. 2007) (1993).

ment. If Leasing Co. finds itself in financial distress, it may attempt to resell the same interests it has already sold to Investor Co. In that case, Subsequent Investor Co. may perform due diligence but not find any record of the previous sale, and agree to purchase the interests from Leasing Co. Under the former rules of priority, Subsequent Investor Co. would normally be deemed to have a superior interest to Investor Co.; however, because of the new rules governing payment intangibles, Investor Co., with its "hidden" interest, would prevail.

This separating or "stripping"[2] of payment streams from underlying equipment lease transactions may create hidden priority interests, as demonstrated in the hypothetical above, in the secured instrument marketplace.[3] These hidden priority interests could reduce the value of the paperized instruments by subordinating future interests in the underlying leases.[4] By allowing such hidden liens, subsequent bona fide purchasers of leases are subordinated to previously unknown and unrecorded third-party interests in the payment streams, thus creating sanctioned market inefficiencies. Additionally, Article 9 of the U.C.C.[5] ("Article 9") allows other priority ambiguities to exist due to the automatic perfection of certain interests.[6] The statutory text giving rise to the problem presents a definitional question: whether certain collateral is a "payment intangible" (with

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[2] Payment stream "stripping" is a type of collateral fractionalization pursuant to which the right to receive payment streams is separated from the underlying instrument. *See* Michael D. Sousa, *Much Ado About Nothing? Collateral Fractionalizing and* In re Commercial Money Ctr. Inc., AM. BANKR. INST. J., Apr. 2007, at 28, 28.

[3] *Id.* (stating that designating payment streams as payment intangibles creates uncertainty in the secured instrument marketplace and would potentially allow for the creation of "secret liens").

[4] *See* NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006) (noting the argument that allowing automatic perfection of payment streams could "wreak havoc on the financing markets"), *aff'g in part, rev'g in part* 56 U.C.C. Rep. Serv. 2d (CBC) 54 (Bankr.. S.D. Cal. 2005). On appeal, the Ninth Circuit ruled on essentially the same issues of perfection as did the district court. Because this note references both decisions, I will refer to the Ninth Circuit decision as "Commercial Money Center," and will refer to the district court decision as "Kipperman" in textual references.

[5] *See generally* U.C.C. §§ 9-101 to 9-709 (2005).

[6] In fact, at least one commentator questions whether any economic benefits flow from payment stream stripping. *See* David Frisch, *Chattel Paper, Shakespeare, and the Insoluble Question of "Stripping,"* 40 UCC L.J. 3, 19 (2007).

potential automatic perfection) or "chattel paper" (which requires filing and/or possession).

At least four serious problems are presented by the current characterization of certain collateral as payment intangibles. First, potential purchasers of leases with supposed underlying payment streams cannot ascertain the quality and value of the purchased leases, given that previous transfers may have been automatically perfected.[7] Second, purchasers of stripped payment streams (i.e., those who arguably should benefit from automatic perfection) will likely need to file financing statements, take possession of the underlying chattel paper, and/or legend the chattel paper in order to guarantee their relative priority position.[8] Third, the potential for hidden interests provides economic incentives for financially distressed sellers of secured interests in payment streams to resell the underlying shell leases to unsuspecting third parties.[9] Fourth, there is now confusion in what were previously settled priority rights as between creditors with conflicting perfected interests.

Part I of this article will analyze the statutory text and comments, the purpose of Article 9, and the case law regarding the contradictory characterizations of stripped payment streams as chattel paper and payment intangibles. Part I will also briefly mention the potential (mis)classification of stripped

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[7] *See* Sandra Stern, *In re* Commercial Money Center, Inc.—*Fractionalizing the Collateral*, *in* WHAT LAWYERS NEED TO KNOW ABOUT U.C.C. ARTICLE 9: SECURED TRANSACTIONS 2008, at 203, 209 (PLI Comm'l Law & Practice, Course Handbook Ser. No. 903, 2008) (noting that due diligence in an acquisition of an interest in a payment intangible will now require greater scrutiny to determine, to the extent possible, whether any such interest had previously been transferred or assigned); *see also* Alan M. Christenfeld & Shephard W. Melzer, *Securitization of Payments Under Equipment Leases,* N.Y.L.J., Oct. 4, 2007, at 5 (noting that no prophylactic measures can entirely protect against prior fraudulent or duplicative transfers).

[8] *See* U.C.C. § 9-330 cmt. 5 (2005) (noting that the common practice for transfers of chattel paper includes placing a "legend" on the paper to indicate any assignments). This practice serves to benefit subsequent acquirers of chattel paper by providing more information to a subsequent party in possession of legended paper. *Id.* This practice more closely "comports with the expectations of . . . chattel paper financers." *Id.*

[9] *See* Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273, 277 (2007) (commenting on the risk that no priority in the intangibles exists for the subsequent purchaser due to a transferor's nefarious intent or mistaken belief, and that purchasers of such interests in the payment streams would need to rely solely on the "transferor's word that such intangibles have not been previously sold").

payment streams as "accounts" and the implications of treating stripped payment streams as secured loans rather than sales. Part II will examine the economic inefficiencies and undesirable market incentives presented by the current version of Article 9, as well as the unsolved problems with competing priorities and shifting collateral issues. Part II will also discuss the policy implications behind the issue of shifting priorities, and will set forth the market-based and legal reasons for disallowing hidden priorities under Article 9.

Part III of this article will outline possible arguments in favor of a different interpretation of Article 9's treatment of stripped payment streams, as well as possible amendments to correct the unintended consequences of the 1999 revisions to Article 9.[10] These revisions, taking nearly ten years to finalize, proposed many changes to deal with problematic issues in the secured transaction marketplace and represent what is now known as revised Article 9.[11] Finally, Part III will set forth two immediately available interpretations of law—either a version of the common law merger doctrine or a more detailed reading of the comments of Article 9—that could allow for a decision in favor of a subsequent acquirer of chattel paper without revising Article 9. Either alternative could eradicate the priority and improper incentive concerns that arise from allowing hidden automatically perfected security interests, and both could be implemented immediately.

## I. JUDICIAL INTERPRETATIONS OF STRIPPED PAYMENT STREAMS—PAYMENT INTANGIBLES, CHATTEL PAPER, OR ACCOUNTS

Several courts have grappled with the stated purposes of Article 9[12] and the challenges that arise from the current ver-

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[10] *See* Stephen L. Harris & Charles W. Mooney, Jr., *Introduction to the Symposium on UCC Revised Article 9*, 74 CHI.-KENT L. REV. 857, 857 (detailing the multi-year process in drafting revisions to Article 9 and noting the expected, and since executed, implementation of the revisions).

[11] *Id.*

[12] *See* pre-revision U.C.C. § 9-101 cmt. 1 (1999) ("The aim of [Article 9] is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."). *See*

sion's definition and treatment of payment intangibles.[13] A 2006 decision of the Ninth Circuit Bankruptcy Appellate Panel (B.A.P.) ruled directly on the characterization of stripped payment streams.[14] In *Commercial Money Center*, Commercial Money Center, Inc. ("CMC") originated equipment leases and thereafter bundled and assigned payment streams under the leases to third-party investors.[15] NetBank, FSB ("NetBank") purchased the rights to payment under several of the bundled lease pools for forty-seven million dollars.[16] Subsequently, CMC filed for bankruptcy protection, and the trustee in bankruptcy

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*also* Sousa, *supra* note 2, at 28 (citing Estate of Haas v. Metro-Goldwyn-Mayer, Inc., 617 F.2d 1136, 1140 (5th Cir. 1980); Ferris, Baker Watts, Inc. v. Stephenson (*In re* MJK Clearing, Inc.), 286 B.R. 109, 123 n.13 (Bankr. D. Minn. 2002)) ("The fundamental purpose of Article 9 is to create certainty by allowing creditors to rely on specific perfection and priority rules that govern collateral within the scope of Article 9.").

[13] *See* Houston v. Eiler (*In re* Cohen), 305 B.R. 886, 903 (B.A.P. 9th Cir. 2004) (holding that an interest in a tort cause of action is a general intangible but not a payment intangible because the required monetary obligation is lacking until such time as a contractual obligation to pay a judgment or claim arises); *see also* U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC, 519 F. Supp. 2d 515, 522-23 (E.D. Pa. 2007) (holding that an interest in contingent legal fees not yet earned is properly defined as an "account" instead of a "payment intangible" because there is always a right to payment, but the contingent portion is the amount that may be collected). Additionally, previous courts have grappled in other contexts with issues involving the stripping of a monetary stream for an underling asset. *See In re* Mintz, 192 B.R. 313, 317 (Bankr. D. Mass. 1996) (holding that distribution rights under a limited partnership interest were properly characterized as "general intangibles") (citation omitted); Biase v. Cong. Fin. Corp. (*In re* Tops Alliance City, Inc.), 372 F.3d 510, 514 (3d Cir. 2004) (holding that the right to proceeds under a real estate lease was properly classified as an "account" under U.C.C. § 9-102(a)(2) even though the actual asset underlying the lease was not subject to Article 9).

[14] NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006). "The principal issue in this case appears to be one of first impression for us or any court of appeals." *Id.* at 469. In addition to a single appellate level decision regarding the characterization of these payment streams, the area of chattel paper and the underlying rights of the chattel paper has not been developed as much as other areas of the U.C.C. *See* Joseph H. Levie, *Security Interests in Chattel Paper*, 78 YALE L.J. 935, 935 (1969) (stating that "[c]hattel paper financing is probably the least known major area of secured transactions law"); Thomas H. Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. CHI. L. REV. 1051, 1051 (1983) (noting the "incomplete understanding" of the interrelationship between chattel paper and rights in the underlying goods); *cf.* 1 BARKLEY CLARK & BARBARA CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 1.01(2)(b) (rev. ed., 2007) (noting that there is now good case law on almost every section of Article 9).

[15] *See In re Commercial Money Ctr., Inc.*, 350 B.R. at 469-72.

[16] *Id.*

sought to avoid NetBank's interest in the payment streams.[17] The crucial issue addressed by the B.A.P. was whether the payment streams were chattel paper, requiring a purchaser to file or take possession to perfect, or a payment intangible, with automatic perfection.[18]

Reversing the bankruptcy court,[19] the B.A.P. determined that the stripped payment streams from an equipment lease were "payment intangibles"[20] rather than "chattel paper"[21] under Article 9.[22] However, the court declined to comment on the potential ambiguities in priorities this classification created for competing security interests.[23] Nevertheless, the characterization of payment streams is critically important because it determines the manner of perfecting a security interest therein.[24]

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[17] *Id.*

[18] *Id.* at 473-75.

[19] *See generally* Kipperman v. NetBank, FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d (CBC) 54 (Bankr. S.D. Cal. 2005).

[20] U.C.C. § 9-102(a)(61) (2005) ("'Payment intangible' means a general intangible under which the account debtor's principal obligation is a monetary obligation."). "'General intangible' means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software." *Id.* § 9-102(a)(42). [Author's note: All references to the U.C.C., and the Official Comments are to the Revised Article 9 unless otherwise noted. The principal cases discussed in this Article were decided under various states' laws which have adopted Revised Article 9 or were decided prior to Revised Article 9; however, other than numbering, there are no material differences between the states' versions and the uniform version of the relevant provisions. *See, e.g.*, *In re Commercial Money Ctr., Inc.*, 350 B.R. at 474.]

[21] § 9-102(a)(11) ("'Chattel paper' means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods.").

[22] *In re Commercial Money Ctr., Inc.*, 350 B.R. at 474-81.

[23] *Id.* at 480 ("We explicitly decline to resolve [the ambiguity created by undisclosed interests in chattel paper] in Revised UCC Section 9-330(b), because neither that statute nor the hypothetical situations posed by the parties are before us on this appeal."). The Ninth Circuit B.A.P. did note that there may be certain inefficiencies with the present definitions of "chattel paper" and "payment intangibles" that may need to be addressed in the future. *Id.*

[24] *See* § 9-309(3) (noting that a security interest in a payment intangible is automatically perfected upon attachment); *id.* § 9-312(a) (providing that a security interest in chattel paper may be perfected by filing); *id.* § 9-313(a) (noting that a security interest in tangible chattel paper may be perfected by taking possession of the collateral); *id.* §

While a security interest in payment intangibles is automatically perfected upon sale of the payment intangible,[25] and an interest in chattel paper can be perfected through filing or possession,[26] only filing can perfect an interest in an account.[27] Notably, several courts have confronted the challenges of defining payment intangibles[28] and handling the problems inherent in such classification.[29]

### *A. Structuring the Stripping—Understanding the Fractionalization of Payments*

The general business of equipment lessors is to purchase and lease equipment, securitize the payment streams under those equipment leases, and then sell the rights in those payment streams to third parties in order to generate liquidity and access to cheaper financing from their otherwise illiquid assets.[30] The originator of the leases (i.e. the original equipment

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9-310(a) (stating the general rule for perfection of security interests, including for "accounts," requires filing a financing statement).

[25] *See id.* § 9-309(3). Additionally, Article 9 does not provide any mechanism to determine between leases and sales, and as such, this particular concern has always been dealt with judicially. *Id.* § 9-109 cmt. 5 ("[N]either [Article 9] nor the definition of 'security interest' in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest."). Additionally, the term "purchaser" under Article 9 generally includes a secured lender. *See id.* § 1-201(b)(29)-(30) (defining a purchaser as "a person that takes by purchase," including taking by, *inter alia*, a pledge, lien, or security interest).

[26] *See id.* §§ 9-312(a), 9-313(a).

[27] *See id.* § 9-310(a).

[28] *Compare* U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC, 519 F. Supp. 2d 515, 528-29 (E.D. Pa. 2006) (stating that rights to payment in unmatured contingency fee agreements were "accounts" rather than "general intangibles"), *with* Houston v. Eiler (*In re* Cohen), 305 B.R. 886, 904 (B.A.P. 9th Cir. 2004) (stating that the right to a personal injury judgment was a "general intangible" rather than an "account" or "payment intangible").

[29] *See generally* NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 465 (B.A.P. 9th Cir. 2006); Kipperman v. NetBank, FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d (CBC) 54, 59-64 (Bankr. S.D. Cal. 2005). *See also* Sousa, *supra* notes 2-3 and accompanying text (noting that the timing and manner of perfection of a security interest in an asset characterized as a payment intangible can give rise to hidden security interests).

[30] *See* Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1371 (1991) ("Securitization has been a boon to virtually every participant in the capital markets, including . . . borrowers seeking to lower their cost of funds by broadening their access to the capital markets; [and] investment bankers generating income by underwriting, making mar-

owner/lessor) often remains as the servicer of the leases.[31] When the originator remains as the servicer, the lessees may never learn that any entity other than the originator has rights in the payment streams or the underlying equipment leases. Uncertainty arises under the law of secured transactions when the lessor grants or sells separate interests in the leases and the payment streams, thereby fractionalizing the two interests.[32] The chart below demonstrates a simplified version of a structure[33] that may be used to accomplish this type of financing (along with a potential subsequent purchaser):

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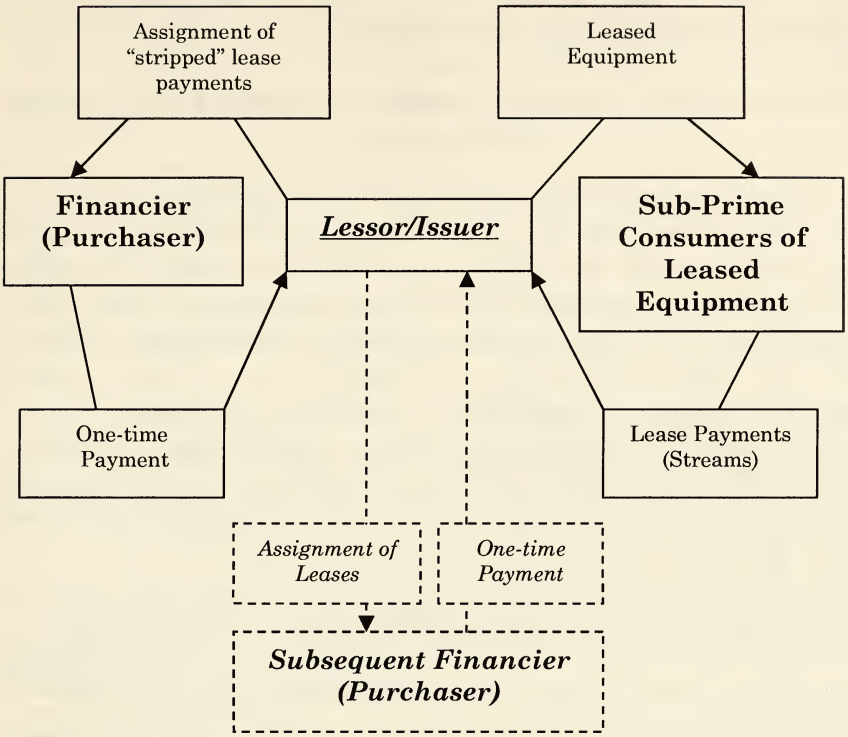
kets in, and trading asset-backed securities . . . ."). In the case of subprime leases, the pool of payment streams may receive a lower than desired credit rating. In such cases, the parties seeking to securitize these assets may attempt to obtain credit enhancements, usually in the form of surety bonds guaranteeing the payments under each individual lease. Then, if the surety bond is obtained, the guaranteed payment streams are bundled into a pool and sold to or borrowed against with a third-party financier. *See also* Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2040-51 (2007). The purpose of the surety bond is to improve the investment grade of the asset pool. The credit enhancements (1) allow the issuer of the security to obtain a credit quality above that of the asset pool and subsequently a higher credit rating than the originator; and (2) increase the likelihood that investors will receive the cash flows that the payment streams represent, in turn allowing the originator to receive a higher price for its payment streams. If the purchaser requires additional security, the originator may assign its rights under any surety bonds it has obtained to enhance the credit rating of the asset pool. *Id.*

[31] Shenker & Colletta, *supra* note 30, at 1429.

[32] *See In re Commercial Money Ctr., Inc.*, 350 B.R. at 469.

[33] *Cf.* Letter from James S. Cochran, Co-Chair, U.C.C. Comm. of the Bus. Law Section of the State Bar of Cal., to the Permanent Editorial Bd. for the U.C.C., app. 1, at 1-2 (Nov. 5, 2006), *available at* http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/ucc/ucc-letter-to-peb.pdf (last visited Jan. 22, 2010). Very often, a bankruptcy remote entity known as a special purpose vehicle (SPV) or a special purpose entity (SPE) is utilized by the originator of the leases. *Id.* The pooled assets are sold to the SPV, which is usually established as a bankruptcy-remote entity that exists solely for the purpose of issuing the payment stream-backed securities. *Id.* For example, in *Commercial Money Center*, approximately twenty-five percent of the transactions used an SPV to securitize the pools of payment streams. *Id.* at 2 n.3.




Problems in these transactions invariably surface when the originator/issuer acting as the servicer enters bankruptcy and a special purpose vehicle was not utilized. If a financier failed to perfect its interest by filing, it may find itself in the unenviable position of an unsecured creditor.[34] If the bankruptcy trustee deems the financier's interests in the pooled assets and/or payment streams to be unperfected, it will likely argue that any such payments to the financier are avoidable using its strong-

[34] An unsecured creditor is an individual or institution that lends money without obtaining specified assets as collateral. *See* BLACK'S LAW DICTIONARY 1539 (6th ed. 1990) (defining "unsecured debt"). There is a higher risk to the creditor in the event of the debtor's default because the loan is not backed by any tangible assets, and the unsecured creditor may be forced to solely accept proceeds from the liquidation of the debtor in full satisfaction of any amount owing to it.

arm powers.[35] The financier then must argue that it perfected in some other fashion (automatically or through possession) or face classification as an unsecured creditor.[36]

### *B. Differentiating Among Chattel Paper, Payment Intangibles and Accounts*

If stripped payment streams under equipment leases meet the definition of "chattel paper,"[37] any party acquiring an interest therein would be required to perfect its interest by either filing a financing statement[38] or taking possession of the underlying leases.[39] If the payment streams, having been stripped from the underlying leases, are classified not as "chattel paper," but as "payment intangible[s],"[40] perfection is automatic upon sale.[41] Since the primary issue is one of definition, courts analyzing the issue under Article 9, as well as courts analyzing similar cases under pre-revision Article 9, typically claim to rest their decisions on the plain language of the statutory text,[42] even though courts reviewing the same statutory text have divined diametrically opposite interpretations of its meaning.[43]

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[35] *See In re Commercial Money Ctr., Inc.*, 350 B.R. at 472 (citing 11 U.S.C. §§ 544(a), 550, 551 (2006)).

[36] In *Commercial Money Center*, for example, the trustee attempted to preemptively defeat any alternative claim by NetBank that it obtained possession or constructive possession of the equipment leases or other related documents. *See id.* at 486.

[37] *See supra* note 21 and accompanying text.

[38] *See* U.C.C. § 9-312(a) (2005) ("[Perfection by filing permitted.] A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.").

[39] *See id.* § 9-313(a) ("[Perfection by possession or delivery.] . . . [A] secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral.").

[40] *See supra* note 20 and accompanying text (defining "payment intangible").

[41] *See* § 9-309(3) (applying to the "sale of a payment intangible").

[42] *See* Kipperman v. NetBank FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d (CBC) 54, 58 (Bankr. S.D. Cal. 2005) (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)). In *Ron Pair Enterprises*, the Court noted that no judicial investigation into the intentions of the statute or its legislative history is appropriate unless "'a literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

[43] *Compare Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 59-61 (analyzing Article 9 definitions to determine that stripped payment streams fit within the definition of "chattel paper"), *with* NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc., 350 B.R. 465, 475 (B.A.P. 9th Cir. 2006) (analyzing Article 9 definitions in determining

### 1. Statutory Interpretation and Official Comments

Under Article 9, collateral must possess three characteristics to be classified as chattel paper.[44] The collateral must (1) be a record;[45] (2) evidence a monetary obligation;[46] and (3) evidence a security interest in or a lease of specific goods.[47] In regard to the lease documents underlying the stripped payment streams, there is usually little doubt that the three elements of chattel paper are met.[48] However, the analysis for the treatment of stripped payment streams has not been as clear. The focus of the court in every case has been first on the text of Article 9,[49] even though that focus has yet to yield a clear resolution in case law.[50]

The crux of the issue is whether a stripped payment stream, standing alone, meets the definition of chattel paper. The second element of chattel paper, a record "evidenc[ing] . . . a monetary obligation,"[51] has caused the courts consternation.[52]

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that stripped payment streams are not "chattel paper" but fit more properly within the definition of "payment intangibles").

[44] *See supra* note 21 (defining "chattel paper").

[45] § 9-102(a)(69) ("'Record' . . . means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.").

[46] *See id.* § 9-102(a)(11) (a "'monetary obligation' means a monetary obligation secured by the goods or owed under a lease of the goods").

[47] *Id.*

[48] *See, e.g.*, *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 60 (noting both parties' concession that the elements of chattel paper had been met for the underlying leases).

[49] *See generally* NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 475-76 (B.A.P. 9th Cir. 2006) (analyzing the definitions in Article 9 and noting that the plain language of a statute is usually conclusive); Houston v. Eiler (*In re* Cohen), 305 B.R. 886, 893 (B.A.P. 9th Cir. 2004) (stating that courts have not deferred to legislative history "in the face of plain . . . statutory language"); U.S. Claims, Inc. v. Flomenhaft & Cannata, 519 F. Supp. 2d 515, 521-23 (E.D. Pa. 2006) (commencing its analysis with the language of Article 9 definitions).

[50] *See* Frisch, *supra* note 6, at 9 n.35 (comparing the testimony of Professor Charles W. Mooney, arguing that Article 9 "does not state that a sale of any right evidenced by the chattel paper carries with it the chattel paper itself," with the declaration of Professor Steven L. Harris, arguing that "rights to payment evidenced by chattel paper . . . including the right to payment of some or all of the rent under a lease, continue to be classified as chattel paper") (citation omitted).

[51] § 9-102(a)(11).

[52] *See generally In re Commercial Money Ctr., Inc.*, 350 B.R. at 465; *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 54.

By relying on canons of statutory construction,[53] the bankruptcy court in *Kipperman* attempted to avoid a direct confrontation with the definitional problem and held that the collateralized payment streams were chattel paper under Article 9.[54] Characterizing a monetary obligation separated from the underlying lease as a payment intangible, the court reasoned, "does not follow from the plain language of the statutory definition of chattel paper," since "such a reading would essentially delete the monetary obligation requirement from the definition."[55] Or, as one famous commentator describing an analogous situation with promissory notes and accompanying mortgages put it, "The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow."[56] Because the statutory text at issue is so brief, the question of whether stripped payment streams fall within the definition of chattel paper is difficult to resolve without referring to the comments.

In reviewing issues of Article 9 interpretation, courts have recognized that the comments are persuasive authority, even though they may not be dispositive.[57] However, the comments do not directly address the classification of payment streams, and even those comments cited in prior cases in support of defining stripped payment streams as chattel paper do so only in-

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[53] *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 59 (citing NORMAL J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, §§ 47:23-25 (6th ed. 2000)) ("A canon of statutory construction is that a definition which declares what a term 'means' excludes any meaning that is not stated."). Article 9 limits the scope of the definition of "chattel paper" by utilizing the term "means." § 9-102(a)(11).

[54] *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 60.

[55] *Id.*

[56] Frisch, *supra* note 6, at 19 (quoting Professor Chester Smith as reported in *Best Fertilizers of Ariz., Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App. 1977), *rev'd on other grounds,* 570 P.2d 179 (Ariz. 1977)).

[57] The Official Comments cited herein are references to the official reporters' comments to Article 9. If there is ambiguity or uncertainty regarding certain provisions of the U.C.C., the courts often look to the Official Comments for general guidance. *See In re* Wiersma, 283 B.R. 294, 300 (Bankr. D. Idaho 2002) (stating that if the plain language of Article 9 does not resolve a dispute, the Official Comments provide guidance to the courts), *aff'd in part, rev'd in part on other grounds* 483 F.3d 933 (9th Cir. 2007); Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass'n of Denver (*In re* Peregrine Entm't. Ltd.), 116 B.R. 194, 198 n.3 (C.D. Cal. 1990) (stating that "although legislative history generally is a poor source of guidance for statutory interpretation, official commentaries are persuasive").

ferentially.[58] Nevertheless, courts have found several of the comments to Article 9 to be persuasive on this point.[59]

Comment 5 to section 9-109, "Transfer of Ownership in Sales of Receivables," states, "A 'sale' of . . . chattel paper . . . includes a sale of a right in the receivable . . . ."[60] The bankruptcy court's decision in *Kipperman* cited this language as the basis for the court's conclusion that the payment stream cannot be separated from the underlying instrument.[61] This comment appears to support the theory of the indivisibility of this class of asset, but it does not solve the definitional problem. By suggesting that stripped payment streams are indivisible from the underlying leases, the comment moderately supports their characterization as chattel paper. However, the comment neither directly addresses nor precludes a prior transfer of the payment streams. It simply states that if chattel paper is sold, it would include the right to payment. Unfortunately, the comment does not address nor foresee any uniform treatment of prior transfers of payment streams. The comment may buttress the bankruptcy court's decision, but if the payment streams themselves are better defined as payment intangibles, the comment is little more than a tautology that fails to address the issue.

A similar argument can be found in comment 2 to section 9-313. This comment provides that "[a] security interest in accounts and payment intangibles—property *not* ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this Article be perfected only by filing."[62] The inference is that collateral that *is* ordinarily represented by a "writing whose delivery operates to transfer the right to payment"[63] (for example, a lease), cannot be an account

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[58] *See* U.C.C. §§ 9-109 cmt. 5, 9-102 cmt. 5(d), 9-313 cmt. 2 (2005); *see also infra* notes 60-68 and accompanying text.

[59] *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 61-62 (citing §§ 9-109 cmt. 5, 9-312 cmt. 2, 9-102 cmt. 5(d), and Gray v. Jefferson Loan & Inv. Bank (*In re* Commercial Mgmt. Serv., Inc.) 127 B.R. 296, 300-02 (Bankr. D. Mass. 1991)).

[60] § 9-109 cmt. 5. The full comment reads: "A sale of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest." *Id.*

[61] *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 61.

[62] § 9-313 cmt. 2 (emphasis added).

[63] *Id.*

or payment intangible, and therefore cannot avail itself of the benefits of automatic perfection. However, this comment and section 9-313 itself was provided to deal with the issue of perfecting a security interest by possession.[64] This comment specifically addresses accounts and payment intangibles only because "delivery" is typically impossible for such asset classes under the common understanding of the term as they are not manifested in a tangible, deliverable form.[65] The comment provides practical, not definitional, guidelines with respect to perfecting an interest by possession. The comment is better read as excluding accounts and payment intangibles entirely from the scope of section 9-313. This interpretation is borne out by the comment's conclusion that "*exempted* assignments [of payment intangibles and accounts] are perfected when they attach," which in the case of payment intangibles, occurs automatically.[66]

Comment 5(d) to section 9-102 (the definitional section for "General Intangible" and "Payment Intangible") further states that "[e]xamples [of general intangibles] are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument."[67] This comment can be read to imply that characterization as a payment intangible would be improper for collateral that is "ordinarily represented by any writing such am [sic] . . . underlying leases"[68] because the fractionalized payment stream obligations are indeed evidenced by chattel paper. The problem with this interpretation is that the exclusionary language applies only to "the right to payment of a loan of funds."[69] In the case of a true sale, the only instance in which perfection is automatic for payment intangibles,[70] the right to the funds from the payment streams does not arise from a loan of funds.

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[64] *See* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 324 (5th ed. 2006) (noting the inapplicability of perfection by possession for property that is incapable of being possessed).

[65] *Id.*

[66] § 9-313 cmt. 2 (emphasis added).

[67] *See id.* § 9-102 cmt. 5(d).

[68] *See* Kipperman v. NetBank, FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d (CBC) 54, 61 (Bankr. S.D. Cal. 2005).

[69] *See* § 9-102 cmt. 5(d).

[70] *Id.* § 9-309(3).

Additionally, it is widely understood that the 1999 revisions to Article 9 regarding payment intangibles were included as a concession to the banking industry, and were specifically meant to bring loan participations within the ambit of Article 9.[71] While the intent to cover loan participations is clear, the final text of Article 9 makes no such distinction. In fact, the only mention of loan participations is illustrative.[72] Initially, the drafters had hoped to solve the loan participation issue by limiting the parties to whom automatic perfection would be available.[73] However, the drafters were unable to find a definition of "financial institution" which was neither too broad, nor too limited.[74] Therefore, the resolution was to broaden the definition of account to include essentially all monetary obligations other than payment intangibles, which at the time were thought to include only loan participations.[75]

One commentator argues that this history should govern Article 9 interpretations, as the stripped payment streams "do not fit within the limited purpose intended for payment intangibles."[76] While the drafters likely did not intend to include stripped payment streams from equipment leases within the category of payment intangibles, the final text of Article 9 is unambiguous. The definition of payment intangible does not expressly limit coverage to loan participations.[77] Thus, based on the statutory text, the conclusion that stripped payment streams are not chattel paper is likely correct.

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[71] *See* Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 174-76 (1999); ROBERT S. SUMMERS & JAMES J. WHITE, WHITE & SUMMERS' HORNBOOK ON THE UNIFORM COMMERCIAL CODE § 22-5 (5th ed. 2000).

[72] *See* § 9-101 cmt. 4(d) ("Certain sales of payment intangibles—*primarily* bank loan participation transactions—should not be subject to the Article 9 filing rules.") (emphasis added).

[73] Shupack, *supra* note 71, at 176.

[74] *See generally* Dan Schechter, *Outright Sale of Payment Intangibles May be Automatically Perfected, but Sale that Allocates Credit Risk to Debtor May be Recharacterized as Disguised Loan*, 2006 COM. FIN. NEWSL., Sept. 6, 2006 at 68.

[75] *Id.*

[76] Anthony N. Kaim, Note, *Classifying the Right to Rental Payment Streams Stripped Off a Lease: An Examination of the Issues Not Discussed in Commercial Money Center*, 86 TEX. L. REV. 857, 881 (2008).

[77] *See supra* notes 72-73 and accompanying text.

If the payment streams are neither chattel paper nor accounts,[78] by process of elimination they would fall into the residual category of general intangibles[79] and then the more narrow definition of payment intangible, since "the [account] debtor's principal obligation is a monetary obligation."[80] This relatively simple classification appears to be the most apt under the plain language of the relevant statutory sections. Other commentators have endorsed this characterization,[81] but the decision is not without criticism.[82]

While the comments and some commentary provide snippets of anecdotal support to the proposition that stripped payment streams be treated as chattel paper, a comprehensive reading of Article 9 is rather inconclusive on the matter.[83] How-

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[78] As an aside, payment streams may have been best characterized as an account, but for their express exclusion from that definition. *See* U.C.C. § 9-102(a)(2) (2005) ("The term does not include . . . rights to payment evidenced by chattel paper or an instrument . . . ."). *See also infra* Part I.B.4.

[79] *See* § 9-102(a)(42) (defining general intangible).

[80] *See supra* note 20 (defining payment intangible).

[81] *See, e.g.*, NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 476 (B.A.P. 9th Cir. 2006) (citing 2 CLARK & CLARK, *supra* note 14, at ¶ 10.08[8][c] (criticizing the bankruptcy court's decision at the trial level classifying payment streams as chattel paper and noting that "carved-out payment streams seem to fit the definition of 'payment intangible' like a glove")).

[82] *See* Kaim, *supra* note 76, at 880. The possibility of characterizing the payment streams as accounts is briefly discussed *infra* at Part I.B.3. That approach is problematic because, although functional as to the inner working of Article 9, such a classification is not borne out by the language of the statute. *See infra* notes 130-35 and accompanying text.

[83] Kipperman v. NetBank FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d 54, 61 & n.4 (Bankr. S.D. Col. 2005) (citing Darlene R. Davis & Edward K. Gross, *Equipment Finance Leasing Documents and Article 9 of the Uniform Commercial Code*, *in* 1 EQUIPMENT LEASING—LEVERAGED LEASING § 3A:11.1 (Bruce Fritch, Albert Reisman & Ian Shrank, eds., 2001), *current version available at* http://www.westlaw.com (find citation "PLIREF-EQUIP s 3A:9.2") (stating that where a lessor assigns, in full or in part, all or any of its rights under a lease, "then it is leveraging or assigning 'chattel paper'"); Amelia H. Boss, *Lease Chattel Paper: Unitary Treatment of a "Special" Kind of Commercial Specialty*, 1983 DUKE L.J. 69, 87 (1983) (positing that Article 9 "considers the transfer of the right to payment under a lease to be chattel paper"); Julian B. McDonnell, *Tangible Chattel Paper: The Impact of Revised Article 9*, *in* 1D PETER F. COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 28.05[1], 28-32 n.2 (Matthew Bender 2003) (stating that the right to payments under a lease agreement "is not to be conceptualized as a general intangible"). *See also* Gray v. Jefferson Loan & Inv. Bank (*In re* Commercial Mgmt. Serv., Inc.), 127 B.R. 296, 305 (Bankr. D. Mass. 1991) (holding that the right to receive payments under an equipment lease can be chattel paper, and thus the security interest can be perfected upon possession); Kaim, *supra* note 76, at 878-80 (arguing that failure to analyze Article 9's rules

ever, case law under pre-revision Article 9 justifies the treatment and interpretation of this type of collateral as chattel paper.[84] The clear problem with relying on such case law for precedential support, however, is that those decisions were rendered before the collateral classification of "payment intangible" ever existed.[85]

### 2. Commercial Money Center and Pre-Revision Article 9 Case Law

#### *a. The Commercial Money Center Case*

Because the primary issue of classifying stripped payment streams is one of statutory construction, the plain language of the statute should govern if the text is not ambiguous. Prior to *Commercial Money Center*, courts had failed to provide detailed

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regarding the right to payment following the collateral, as well as the drafters' intent in creating the payment intangible classification resulted in the erroneous classification of payment intangible rather than an account).

[84] *See In re Commercial Mgmt. Serv.*, 127 B.R. at 296 (holding under Rhode Island law that the right to receive payments under an equipment lease can be chattel paper, and thus the security interest is perfected upon possession). Although *Commercial Management* was decided prior to revised Article 9 and in the Federal District of Massachusetts, the bankruptcy court hearing *Kipperman* found that case persuasive given a similar fact pattern, legal issue, and the fact that the court did not believe the outcome in *Commercial Management* would have been any different under revised Article 9. *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 62. *See also In re* Bennett Funding Group, Inc., 203 B.R. 30, 39 (Bankr. N.D.N.Y. 1996) (holding that perfection of an interest in chattel paper by filing also serves to perfect an interest in the identifiable proceeds of that chattel paper while declining to resolve whether perfection by possession of the chattel paper alone would also perfect an interest in the identifiable proceeds of that chattel paper). It should be noted, however, that the primary issues in *Bennett Funding* involved section 552 of the Bankruptcy Code and as such pitted the trustee against the alleged secured parties rather than a priority dispute between secured creditors. *Id.* at 38. It should also be noted that among the cases cited in *Commercial Management*, two support, at least indirectly, the characterization of a stripped lease payment as a payment intangible, but in both cases, the rulings were deemed irrelevant as they dealt with non-Article 9 issues. *See* FDIC v. W. Hugh Meyer & Assocs., Inc., 864 F.2d 371, 375 (5th Cir. 1989) (holding, under the provisions of Article 8 of the U.C.C., that because possession was essential under Texas law to obtain a secured interest, a third-party assignee of pledged stock had priority over a bank (who never obtained possession) to whom a security interest in the stock had previously been granted); Repp v. Sabre Farms, Inc. (*In re* Sabre Farms, Inc.), 27 B.R. 532, 536 (Bankr. D. Or. 1982) (holding, in the case of real estate interests, that "[t]he right to receive rent under a lease of land is a general intangible").

[85] *See* U.C.C. § 9-101 cmt. 4(a). (noting that former Article 9 did not include sales of payment intangibles within its purview).

support for their analysis in defining payment obligations under a lease as chattel paper.[86] Therefore, the crux of the definitional question remains whether payment streams stripped from the underlying leases are simply records that evidence monetary obligations, or are indeed monetary obligations themselves.

The bankruptcy court in *Kipperman* characterized the underlying payment streams as chattel paper while the B.A.P. characterized the payment streams as payment intangibles, both seemingly based on the plain language of the statute.[87] As a result, the decisions are entirely incompatible as well as imperfect for a number of reasons. The first failed to grapple with the essence of the issue—whether the underlying payment streams themselves meet the definition of chattel paper.[88] The second decision likely properly classified the collateral as a payment intangible, but noted that its decision had the potential to create ambiguities in areas of settled law regarding priority and perfection issues, and sale versus loan issues.[89]

The bankruptcy court reasoned that chattel paper was the proper classification because defining payment streams as payment intangibles "would essentially delete the monetary obligation requirement from the definition [of chattel paper]."[90] This reasoning, however, only obfuscates the central issues in defining "chattel paper"—whether stripped payment streams are "records" that (1) evidence a monetary obligation, and (2) are a lease of specific goods.[91] The statement by the bankruptcy court erroneously misconstrues the language of the definition of chattel paper. Instead of reading the latter clauses of the definition (i.e. "evidencing a monetary obligation," and "a lease of specific goods") as modifiers of the type of record at issue, it sees the stripping of payment streams as an end-run around the statutory requirement of a monetary obligation. That is not the case. Any record meeting the definitional requirements of chattel pa-

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[86] *See infra* note 107 and accompanying text (noting the *Commercial Management*, *Bennett Funding Group*, and *In re Leasing Consultants* cases).

[87] *See Kipperman*, 56 U.C.C. Rep. Serv. 2d at 64; *NetBank,* 350 B.R. at 476.

[88] *See Kipperman*, 56 U.C.C. Rep. Serv. 2d at 61.

[89] *See In re Commercial Money Ctr., Inc.*, 350 B.R. at 478-80.

[90] *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 60.

[91] *See supra* notes 46-48 and accompanying text (noting that the required records are those that "evidence both a monetary obligation, and a . . . lease of specific goods").

per, which would necessarily include a monetary obligation, will continue to constitute chattel paper.

Reversing the bankruptcy court's decision, the B.A.P. in *Commercial Money Center* held that severed pieces of underlying chattel paper are not chattel paper themselves solely because they are derived from chattel paper.[92] The court reiterated its opinion that, while delivery of chattel paper may transfer a perfected interest in the payment streams,[93] the streams themselves are not chattel paper.[94] From the time of the decision, commentators have both praised[95] and condemned[96] the decision. However, even among the dissenters, the common criticism is not improper analysis of the statutory language, but rather the commercial effects of the decision.[97]

While the B.A.P.'s decision in *Commercial Money Center* was founded on statutory analysis like the bankruptcy court before it, the B.A.P. sought additional support for its conclusion. After first examining and then discarding the cases cited as precedential by the bankruptcy court, the B.A.P. noted that prior case law did not compel a decision that payment streams be classified as chattel paper.[98] The B.A.P. also reviewed its interpretation of payment streams against the policies of predictability in financial transactions.[99] The B.A.P. did not believe there was an actual conflict between its decision and those policies.[100]

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[92] *In re Commercial Money Ctr.*, 350 B.R. at 478 ("Certainly if you sell a piece of chattel paper, it does come with all the rights that are thereunder. But the flip side of that is not true. If you buy some of the pieces under the chattel paper (i.e. the payment streams), it doesn't mean that you're getting the chattel paper as well.") (citing Transcript of Record at 50:13-17, *Kipperman*, 56 U.C.C. Rep. Serv. 2d 54 (No. 02-09721-H7).

[93] U.C.C. § 9-313(a) (2005).

[94] *In re Commercial Money Ctr.*, 350 B.R. at 478.

[95] *See e.g.* 2 CLARK & CLARK, *supra* note 14, at ¶10.08[8][b], [e].

[96] Even co-reporters of Revised Article 9 took opposing positions as to the proper characterization of the collateral. *See* Frisch, *supra* note 6, at 4 (citing *In re Commercial Money Ctr.*, 350 B.R. at 467, 480 n.12).

[97] *Id.* at 19 (stating that "if there are [benefits to be gained from stripping], they have yet to be presented in convincing fashion"); *see also* Schwarcz, *supra* note 9, at 277 (arguing that the inability to determine ownership priority lessens the value of such instruments when sales do take place).

[98] *See In re Commercial Money Ctr.*, 350 B.R. at 476-79.

[99] *Id.*

[100] *Id.*

As to future concerns arising out of this interpretation, the court held that it was the role of the court to interpret, not redraft.

At the end of the day, the B.A.P. was simply unwilling to re-interpret the text of the statute to fit what was argued as its intended purpose.[101] After analyzing the plain language, comments, and case law, the *Commercial Money Center* court held that "[the underlying payment streams] are not 'records' that 'evidence' monetary obligations, they *are* the monetary obligations."[102] Therefore, the payment streams must be payment intangibles regardless of the intent of the drafters or the stated purposes of Article 9. As noted in Part I.B.1, however, cases decided prior to the revisions to Article 9 tend to disagree.

*b. Case Law Under Pre-Revision Article 9*

Prior to revised Article 9 (and its creation of payment intangibles with automatic perfection), courts grappled with the treatment of collateral such as payment streams and generally decided to treat it as chattel paper in light of their interpretation of the purposes of Article 9.[103] In one such case, *In re Commercial Management Service*, an equipment provider stripped payment streams from the underlying equipment leases and sold the right to collect the future lease payments to a third-party financial institution.[104] The specific issue in *Commercial Management* was whether a right to receive a payment stream severed from the underlying lease was an interest that could be shown and perfected by possession of chattel paper.[105] The *Commercial Management* court noted that although pre-revision Article 9 did not explicitly provide for such an outcome:

> Taking possession of the collateral, the chattel paper itself, would be meaningless unless the paper represented the underlying rights which were transferred by a transfer of the paper. Therefore, the necessary implication of section 9-305 is that

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[101] *Id.* at 477.

[102] *See generally id.* at 465.

[103] *See supra* note 12 and accompanying text (noting purposes of Article 9).

[104] *See* Gray v. Jefferson Loan & Inv. Bank (*In re* Commercial Mgmt. Serv., Inc.), 127 B.R. 296, 298-99 (Bankr. D. Mass. 1991).

[105] *Id.* at 302.

> delivery of chattel paper operates to transfer the claim that the paper represents.[106]

The *Commercial Management* court went on to note, as have subsequent courts,[107] "[A] lease is treated as the embodiment of the rights it represents such that these rights are transferred by a transfer of the lease document."[108] This holding states that certain property, represented by a writing whose delivery transfers the right to payment, is indivisible from the right to receive payment thereunder. As such, it provides the strongest support for disallowing the separation of payment streams from the leases in the first instance.

However, unlike the straightforward analysis used to determine whether certain tangible instruments are chattel paper, courts undertake an additional step in determining whether the right to the payments due under such instruments would likewise be considered chattel paper.[109] Courts rely upon inferences from other sections of Article 9 to provide the final analysis in characterizing stripped rights to lease payments as chattel pa-

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[106] *Id.* (quoting Boss, *supra* note 83, at 92-93).

[107] In *Bennett Funding*, an equipment provider was engaged in the commercial leasing of copy machines and office equipment. *In re* Bennett Funding Group, Inc., 203 B.R. 30, 32 (Bankr. N.D.N.Y. 1996). The equipment lessor bundled the leases into portfolios, which it then sold to third parties. *Id.* The issue of whether leases are chattel paper has already been answered in the affirmative in numerous cases. *See, e.g.*, *id.* at 30; *In re Commercial Mgmt. Serv.*, 127 B.R. at 296; Feldman v. First Nat'l City Bank (*In re* Leasing Consultants, Inc.), 486 F.2d 367, 370 (2d Cir. 1973). *Bennett Funding*, however, was mainly concerned with whether the leases themselves were chattel paper or general intangibles. *In re Bennett Funding Group*, 203 B.R. at 33. The distinction between the payment streams and the leases came up only when the court noted that chattel paper "in this case consists of individual leases of equipment and the monetary obligation payable at some time in the future." *Id.* at 38. This additional distinction was added solely because the court analyzed certain Bankruptcy Code provisions that differentiated between chattel paper and proceeds. *See* 11 U.S.C. §§ 544, 552 (2006) (allowing the bankruptcy trustee to avoid unperfected security interests and governing whether a prepetition security interest would extend to the payments received by a bankruptcy trustee post-petition respectively). It was not used in resolving the initial definitional issue, nor does it help resolve the issue of the treatment of payment intangibles. *In re Bennett Funding Group*, 203 B.R. at 38.

[108] *In re Commercial Mgmt. Serv.*, 127 B.R. at 302 (quoting Boss, *supra* note 83, at 92-93).

[109] *See generally In re Commercial Mgmt. Serv.*, 127 B.R. at 299-303; *see also* Kipperman v. NetBank FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d 54, 61 (Bankr. S.D. Col. 2005).

per.[110] Most frequently cited, unsurprisingly, are those sections involving the definitions of "intangibles" and "chattel paper," as well as "accounts."[111]

Pre-revision Article 9 decisions generally upheld the classification of payment rights under leases as chattel paper, ruling that the existence of a writing "usually transforms [the right to the underlying payment] into chattel paper."[112] In these cases, courts made the essential inference that because the drafters of Article 9 included leases in the definition of chattel paper, their intent on the treatment of leases was clear. "[T]he necessary implication . . . is that delivery of chattel paper operates to transfer the *claim* that the [chattel] paper represents."[113] Under this reasoning, possessors of the underlying leases would have priority over non-possessors in the payment streams, presumably due to section 9-330.[114]

Yet, the definitional process is incomplete under this line of reasoning, and it fails to answer the fundamental underlying question—whether an interest in the payment streams of a lease should be considered chattel paper. The incompleteness comes from the conclusion that, because leases are chattel paper, and since the transfer of chattel paper serves as a transfer of the underlying interest in the chattel paper, the transfer of the underlying interest must also be chattel paper. However, this conclusion is not necessarily correct. First, recent cases have upheld the transfer of chattel paper without the underlying interest. Second, there is no definition or connection that

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[110] *See In re Commercial Mgmt. Serv.*, 127 B.R. at 303-04; *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 62-63 (paraphrasing or inserting entirely the holding of *Commercial Management*).

[111] U.C.C. § 9-102(a)(2) (2005). Account means "a right to payment of a monetary obligation . . . for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of . . . [which] does not include . . . rights to payment evidenced by chattel paper or an instrument." *Id.* Pre-revision U.C.C. section 9-106, used by the Court in *Commercial Management*, provided a similar but slightly different definition of account: "any right to payment for goods sold or leased . . . which is not evidenced by an instrument or chattel paper." Pre-Revision U.C.C. § 9-106 (1999).

[112] *In re Commercial Mgmt. Serv.*, 127 B.R. at 303; *see also* § 9-102(a)(2). The definition of "account" would encompass payments due under chattel paper except for the express exclusion. *In re Commercial Mgmt. Serv.*, 127 B.R. at 303.

[113] *Id.* at 302. (emphasis added).

[114] *See* § 9-330(a), (b) (providing rules governing the priority of claims for purchasers of chattel paper).

requires treatment of an underlying interest in chattel paper to also be considered chattel paper.

Returning to the simple analogy in the introduction: if you sell a car, you usually (though not always) sell the motor as part of the car; but if you sell the motor, you do not necessarily sell the entire car. Therefore, while some courts and commentators have concluded that Article 9 "considers the transfer of the right to payment under a lease to be chattel paper,"[115] the fact that a writing exists without more should be insufficient to define the collateral at issue as chattel paper if it fails to satisfy all the definitional requirements under Article 9.

### 3. The Importance of Predictability, and the Purpose of Article 9

As noted above, the stated purpose of Article 9 is to provide predictability and security in commercial transactions.[116] Both the bankruptcy court and the B.A.P. in *Commercial Money Center* declined to classify the transactions at issue as *sales* of payment intangibles.[117] Both courts hoped to avoid future priority claims as well as disputes over whether specific transfers of stripped payment streams were sales,[118] which get automatic perfection, or secured loans, which do not.[119] For purposes of predictability, the designation of the payment streams as chattel paper is preferable due to the ease and consistency of treatment. However, in regard to the definitions provided in Article 9, the proper characterization of the underlying payment streams is likely payment intangible.

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[115] *In re Commercial Mgmt. Serv.*, 127 B.R. at 303 (citing Boss, *supra* note 83, at 92-94).

[116] *See supra* note 12 (citing pre-revision Article 9's statement of purpose).

[117] The distinction between a sale and loan in cases dealing with payment intangibles is of paramount import as automatic perfection may hinge on the final decision. *See infra* Part I.C.

[118] Kipperman v. NetBank FSB (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d 54, 64 (Bankr. S.D. Col. 2005) (stating that "to include the right to payment under chattel paper in the definition of payment intangibles would 'lead to endless debates over whether particular factoring transactions are true sales or, in substance, secured loans'") (citing Trustee's Mem. of Points and Authorities in Opp'n to Mot. for Partial Summ. J. at 36:2-3, *In re Commercial Money Ctr., Inc.*, 56 U.C.C. Rep. Serv. 2d. 54 (No. 85)).

[119] *Id.*

If in fact stripped payment streams are better classified as payment intangibles under the current language of section 9-102, one of the primary concerns must be the hidden priorities which may arise due to automatic perfection.[120] The problems with predictability arise in the context of competing secured interests. Under section 9-330(b), a purchaser of chattel paper can protect its interest *in the chattel paper* as against other interests in that same chattel paper by taking possession of it,[121] whether the leases are assigned as a security for a loan or sold outright.[122] However; the priority rule in section 9-330(b), if read strictly, applies only to "a security interest *in the chattel paper*."[123] If the interest in the payment streams is deemed a payment intangible and not chattel paper, the priority rules in section 9-330(b) would appear to be inapplicable to security interests in payment intangibles which are automatically perfected. By definition then, the section 9-330(b) superpriority statute deals with interests in chattel paper, not with interests in payment intangibles.[124]

If *Commercial Management* was correctly decided and rights to rental payments could be evidenced and perfected by possession of chattel paper, an assignment of an interest in chattel paper should still include the associated payment

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[120] NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006). The B.A.P. in *Commercial Money Center* recognized these hidden priorities as problematic, but declined to address the issue as it was not yet ripe. *Id.* at 480. The court noted, "We are not persuaded that the plain meaning of the statute conflicts with [the policies of certainty in financial transactions and the ability to discover competing interests], or alternatively that it is our role to rewrite the statute if there is any such conflict." *Id.* at 477.

[121] U.C.C. § 9-330(b) (2005) (emphasis added) ("A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.").

[122] The scope of Article 9 includes both and does not differentiate in its treatment of the two. *See id.* § 1-201(b)(30) (noting that the term "purchaser" includes a secured lender). A purchaser, defined as a person that takes by purchase, includes taking by, *inter alia*, a pledge, lien, or security interest. *Id.* § 1-201(b)(29).

[123] *See supra* note 121 (emphasis added).

[124] § 9-330(b).

streams as long as they have not been previously stripped.[125] Furthermore, any non-stripped interest in the payment streams would be deemed an interest in the investor's chattel paper, and under the priority rules of section 9-330(b), lenders would have the predictability sought.[126] However, if the payment streams had been stripped and sold prior to the sale or assignment of an interest in the chattel paper, the interest in the chattel paper would be junior to the automatically perfected interest in the payment streams.[127] Therefore, regardless of the correctness of doing so, commercial uncertainty results from treating payment streams as payment intangibles. While revised Article 9 may have created payment intangibles primarily to deal with loan participations,[128] neither the statute nor the comments exclude stripped payment streams from such coverage. Consequently, a proper interpretation of Article 9 leads to more commercial uncertainty rather than less.

### 4. Accounts

True leases are much more similar to accounts than to chattel paper.[129] Nevertheless, leases are not accounts because they are expressly excluded from the definition of account in Article 9.[130] As mentioned above, revised Article 9 broadened

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[125] *See, e.g.*, Gray v. Jefferson Loan & Inv. Bank (*In re* Commercial Mgmt. Serv. Inc.), 127 B.R. 296, 303-06 (Bankr. D. Mass. 1991).

[126] *Id.*

[127] *See* Schecter, *supra* note 74, at 71 (noting that, although the issue is murky, the decision reached by the *Commercial Money Center* court is probably "fundamentally right").

[128] *See* WHITE & SUMMERS, *supra* note 71, at §22-5 (banks demanded automatic perfection for loan participations because they were inherently controlled by limited numbers in the marketplace, as well the correlating unnecessary cost and burden involved with perfecting their interests therein).

[129] *See* Boss, *supra* note 83, at 86-90 (noting that rights to payments under a lease meets the statutory definition of account but for the proviso that any such right to payment evidenced by an instrument or chattel paper is by definition excluded from being so defined; although the fact that a lease is in writing does not, by itself, distinguish it from an account which may also be embodied in a writing). The drafters' intent in excluding leases from the definition of account was to unify Article 9's treatment of leases, whether they be true leases or security leases in order to remedy any problems in dealing with disguised conditional sales. *Id.* at 88-89.

[130] *In re Commercial Mgmt. Serv.*, 127 B.R. at 303. The right to receive payments separated from an underlying lease appears to satisfy the necessary criteria (the right to payment of a monetary obligation for property that has been leased) to be characterized

the scope of "account" to include nearly every monetary obligation, but specifically excluded rights to payment "evidenced by chattel paper."[131] One commentator has argued that it is disingenuous to disqualify stripped payment streams from the definition of account based on the chattel paper exclusion.[132] While the argument is unique, and based more on purpose than language,[133] it is easily dispatched. The argument for including stripped payment streams within the definition of account either misstates or misconstrues the applicable statutory language. The exclusion within the definition for "account" is for a "right to payment evidenced by chattel paper."[134] A payment stream is exactly that—a right to receive payment derived from the lease. This analysis is entirely distinct from a determination that the payment stream itself is a record evidencing a monetary obligation. The only way to arrive at the conclusion that stripped payment streams are more properly deemed accounts is to equate "rights to payment evidenced by chattel paper" with a "record . . . that evidence[s] . . . a monetary obligation."[135] Based on a plain language set forth in the preceding sentence, these two items are easily differentiable on both a definitional and functional basis.

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as an account. *Id.* Another commentator has argued that, if stripped payment streams are not characterized as chattel paper, the proper classification should be accounts. *See* Kaim, *supra* note 76, at 880.

[131] U.C.C. § 9-102(a)(2) (2005); *see* Steven O. Weise, *An Introduction to Revised U.C.C. Article 9*, 70 PENN. B. ASS'N. Q. 158, 159 (Oct. 1999) (noting that revised Article 9 broadened the definition of "accounts" to include payment obligations arising out of credit card receivables as well as those arising out of the sale, lease, or license of many types of tangible and intangible property).

[132] *See* Kaim, *supra* note 76 at 880 ("[I]t is contradictory to maintain both that the payment stream is not evidenced by chattel paper and also that the payment stream cannot be an account solely because it is 'evidenced by chattel paper.'").

[133] *Id.* at 879 (restating the drafters' intent to broaden the scope of accounts while limiting the reach of payment intangibles).

[134] *See* § 9-102(a)(2).

[135] *Id.*; *see also* § 9-102(a)(11).

### *C. Form v. Substance—A Short Note Regarding the Classification of a Stripped Payment Stream and What It Means Going Forward (Sale v. Loan)*

Because automatic perfection of a security interest in a payment intangible under section 9-309 applies only to a true sale, it is critical to determine whether the transaction between the lessor/originator and the financier/purchaser is indeed a sale or merely a loan. While parties may attempt to draft their documents to conform to certain notions of a sale or a loan as the case may be, the clear implication from prior cases is that the identity of such documents is ultimately determined by the courts based on the substance of the transaction.[136]

If a stripped payment stream is properly classified as a payment intangible, the next question is whether the transfer of that payment intangible was a sale or a loan.[137] If the transaction is not a sale, the rule of automatic perfection will not apply.[138] Practically speaking, this means that parties can attempt to manipulate such outcomes in the drafting of the transactional documents. By characterizing a transaction as a sale, the parties may expect to obtain the benefits of automatic perfection. Conversely, by characterizing the transaction as a secured loan, the parties can assure that any perfection of a security interest must be obtained through possession or filing assuming that their characterizations are correct. Regardless of the determination, this is an issue that cannot be resolved solely by resorting to statutory language, but rather is dependent on the facts of the specific case. As such, even careful drafters may receive unexpected outcomes if a fact-finder disagrees with the purported characterization of the transaction.

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[136] *See* 2 CLARK & CLARK, *supra* note 14, at ¶ 10.08[8][e] (stating the recent decision "remains an important precedent on the factors that courts should consider in determining whether the transaction is a loan or a sale"). *Cf.* Kaim, *supra* note 76, at 863 (noting that some states have enacted so-called true-sale laws that would attempt to give primacy to the label the parties give to the transaction).

[137] *See* Schechter, *supra* note 74, at 69-71 (noting that automatic perfection may depend on the issue of whether or not a transaction is a true sale versus a disguised loan).

[138] § 9-309 (noting that a security interest in the "*sale* of a payment intangible" is automatically perfected) (emphasis added).

## II. Competing Priorities and Market Inefficiencies

### *A. Relative Priorities and Interrelationships Among Competing Interests in Collateral or Interests in Separate Collateral*

#### 1. Competing Priorities and Phantom Competitors

Arguably, the primary problem in classifying stripped payment streams as payment intangibles is the ambiguity in priority between a buyer of the stripped payment stream and a subsequent purchaser of the underlying chattel paper.[139] Priority conflicts where a party has taken possession of the chattel paper are resolved under U.C.C. section 9-330, known as the "superpriority" rule.[140] Generally, conflicting priorities *in* the chattel paper are resolved by temporality or possession,[141] while conflicts between interests in the chattel paper and its proceeds are governed by section 9-322.[142] However, if the stripped payment streams are deemed to fall outside of section 9-330 because the purchaser's interest is not "*in* the chattel paper which is claimed,"[143] there may be no good answer within Article 9 for how to treat any subsequent conflict as between an interest in chattel paper and one in a payment intangible.[144]

Whether or not such payment streams fall outside of Article 9 is still very much open to debate. One of the reporters of Article 9 posited that sections 9-330(b) and (c), together with section 9-322(c), should be read as including an interest in the stripped

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[139] *See id.* § 1-201(b)(29) ("'Purchase' means taking by sale, . . . mortgage, . . . lien, security interest, . . . or any other voluntary transaction creating a security interest in property."). By definition, a subsequent purchaser would also include a lender taking an interest in chattel paper to secure a loan. *Id.*

[140] *See id.* § 9-330; *c.f. id.* § 9-322 (providing the standard rule among conflicting priorities that the first party to file or perfect its interest prevails).

[141] *See id.* §§ 9-322(a), 9-330(b).

[142] *See id.* § 9-322(c).

[143] *Id.* § 9-330(b) (emphasis added).

[144] The B.A.P. in *Commercial Money Center* was well aware of the conflict when it noted, "We have just held that the payment streams stripped from the leases are not chattel paper, so arguably this special priority rule is inapplicable." NetBank, FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 480 (B.A.P. 9th Cir. 2006). The B.A.P. then stated that as the issue was not before it, it "explicitly decline[d] to resolve this ambiguity in Revised UCC Section 9-330(b)." *Id.*

payment intangible.[145] Mr. Weise argues that a secured party who takes possession of chattel paper has superpriority in the cash proceeds of the chattel paper under sections 9-330(c)(1) and 9-322(c)(2).[146] However, a purchaser must have priority under section 9-330(a) or (b) in order for 9-322 to apply.[147] As the B.A.P. in *Commercial Money Center* noted however, with stripped payment streams the conflicting security interest lies with payment intangibles, not chattel paper.[148]

Alternatively, when revenue streams generated by the stripped payment streams are the "proceeds" of chattel paper,[149] *and* when there is possession-based priority in that chattel paper under section 9-330, section 9-322 may be invoked.[150] Yet, a priority in proceeds does not require a conflict in priority between two (or more) interests in chattel paper.[151] More simply put, if I have the only secured interest, I win as against all other secured interests (of which there are none). Comment 8 to section 9-322, "Proceeds of Non-Filing Collateral: Non-Temporal Priority," gives weight to this outcome by stating that the priority rules of section 9-322 apply even if there is no conflicting security interest in the original non-filing collateral.[152]

However, this resolution is by no means a guaranteed interpretation of Article 9. Under subsection (c), only security interests in chattel paper "which qualify for priority under . . . 9-330" are within the scope of section 9-322.[153] Because section 9-

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[145] Posting of Steve Weise, Steven.Weise@hellerehrman.com, to http://lists.washlaw.edu/mailman/listinfo/ucclaw-1/ (Aug. 31, 2006) (on file with the author).

[146] In order for section 9-322 to apply, the payments under the stripped payment streams would need to be considered cash proceeds, which they normally would be. *See* § 9-102(a)(9) (defining "cash proceeds").

[147] *See id.* § 9-322(c) (providing that "a security interest in collateral which qualifies for priority over a conflicting security interest under Section . . . 9-330 . . . also has priority over a conflicting security interest").

[148] *See* 350 B.R. at 480.

[149] *See* § 9-322(c)

[150] *Id.*

[151] Posting of Steve Weise, *supra* note 145.

[152] *See* § 9-322 cmt. 8 (noting that "priority in the original collateral continues in proceeds if the security interest in the proceeds is perfected and the proceeds [themselves] are cash proceeds").

[153] *See id.* § 9-322(c) ("Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under

330 omits any mention of payment intangibles, it remains unclear whether a security interest in collateral (in our case, the security interest in the underlying loan/chattel paper) qualifies over a conflicting security interest (the payment intangible). The word "qualifies" arguably suggests priority disputes involving payment intangibles are indeed within the scope of section 9-322.[154] Since, hypothetically, any potential priority qualifies for priority in the original collateral (were there such a challenge), the existence (or lack thereof) of a priority dispute in the original collateral is therefore arguably immaterial to the section 9-322 analysis.[155]

Whether a court would even engage in this section 9-322 analysis is a thornier problem. With respect to chattel paper, section 9-322 is only triggered when there is a conflict under section 9-330. Yet section 9-330 is limited to conflicts between security interests in the chattel paper itself. Does the sale of payment streams and the accompanying automatic perfection produce a security interest in collateral (the underlying leases) that "qualifies for priority" over a conflicting security interest under section 9-330 (a conflicting interest in the chattel paper)? Without using hypothetical priorities, the answer must clearly be "no" because the conflicts arise from a conflict in the same proceeds of two separate pieces of collateral (the payment streams as payment intangibles, and the leases as chattel paper). Thus, section 9-330, by its terms, would not seem to apply. However the issue is resolved, the larger problem for the secured transaction marketplace is that neither reading is particularly strained nor illogical.

If the use of the hypothetical conflict is allowed, then section 9-330(a) or (b) would permit the application of section 9-330(c) and section 9-322(c) in dealing with the cash proceeds of the chattel paper and the payment intangibles. In such case, the Code would seem to provide the more commercially predictable

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Section 9-327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in . . . any supporting collateral; and . . . the proceeds of the collateral . . . .").

[154] Posting of Steve Weise, *supra* note 145 (noting that the word "qualifies," together with comment 8 to section 9-322, provides wide latitude in the scope of the applicability of section 9-330).

[155] *Id. See also* §§ 9-322(c), 9-330(b), 9-322 cmt. 8.

outcome by allowing the possessor of chattel paper to prevail over a party whose interest was perfected automatically at some earlier point in time. This argument has the additional benefit of immediate adoptability with no revisions to the Code necessary.

### 2. Going Once, Going Twice

A literal reading of section 9-318[156] could preclude analysis under section 9-322 and section 9-330 because section 9-318 prohibits reselling interests except in certain limited circumstances.[157] Therefore, a subsequent purchaser would be well advised to consider the potential effect of section 9-318 before relying on section 9-322 for a priority ruling. Logically, once a seller has sold stripped payment streams, he should no longer have an interest in the payment streams to sell to a third party.[158] Yet section 9-318(b), which allows a seller to sell chattel paper a second (or greater) time if the first buyer has not perfected his security interest, arguably may change this result.[159]

Initially, a literal reading of comment 4 to section 9-318 reinforces buyers' fears that subsequent purchasers of payment intangibles who obtain priority under another section of Article 9 may usurp their rights.[160] Yet the priority exception established in the comment is qualified by the words "of a promissory note," implying the exception may not actually apply to payment

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[156] *See* § 9-318. The official title is "No Interest Retained in Right to Payment That Is Sold; Rights and Title of Seller of Account or Chattel Paper With Respect to Creditors and Purchasers."

[157] An example of such a limited circumstance would include a seller transferring its interest in chattel paper to a buyer who does not perfect its interest, and then the seller subsequently transfers the interest again to a second buyer who perfects. Under this situation, the second buyer's interest, though later in time, is superior to the original buyer's interest. *See id.* § 9-318 cmt. 3.

[158] *See id.* § 9-318(a) ("A debtor that has sold a[] . . . payment intangible . . . does not retain a legal or equitable interest in the collateral sold.").

[159] *See id.* § 9-318(b) & cmt. 3 (noting that "[i]f the buyer's security interest [in the chattel paper] is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold"); *see also id.* at cmt. 4 (noting that the rule is not without exception, but is "generally" applicable).

[160] *See id.* § 9-318 cmt. 4 (stating that transferees from and creditors of a seller of payment intangibles could not generally acquire an interest in the sold payment intangibles).

intangibles.[161] Both payment intangibles and promissory notes are enumerated in the commentary because interests in both are automatically perfected upon sale,[162] but the two are otherwise dissimilar. Additionally, while comment 3 to section 9-318 provides that a purchaser who takes possession of a promissory note can achieve superpriority under section 9-330 even if the interest in the note had been previously sold to a third party, it makes no mention of payment intangibles.[163] Consequently, courts should not apply the priority exception of section 9-318 comment 4 to payment intangibles. Section 9-330(d) already treats the two instruments differently. Furthermore, the intangible nature of payment intangibles frustrates the transfer of physical possession following a sale, preventing the purchaser from securing his interest as required to avoid the priority exception under section 9-318 comment 4.[164]

Nevertheless, the proper mechanism for resolving priority disputes has long been found in the statutory text of Article 9, notwithstanding the plain language of section 9-318 and its comment.[165] Section 9-318 was inserted into Article 9 with the explicit purpose of rejecting the holding in *Octagon Gas Systems v. Rimmer*,[166] where the Tenth Circuit concluded an account assigned pre-petition was properly considered estate property of

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[161] *Id.* (providing that even in the case of the sale of a payment intangible with its accompanying automatic perfection, "in certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under Sections 9-330 or 9-331, over the security interest of an earlier buyer of the promissory note").

[162] *See* § 9-309.

[163] *Id.* § 9-318 cmt. 3. *See also id.* § 9-330(d) (providing for a priority if a subsequent party gives value and takes possession of the promissory note).

[164] Alternatively, though perhaps unlikely, a court could conclude that the ability to transfer such greater rights exists pursuant to section 9-203(b)(2). *See id.* § 9-203(b)(2) ("[T]he debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party . . . ."); *see also id.* § 9-203 cmt. 6 ("Certain exceptions to the baseline rule [that a transferor may transfer only what rights it has] enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has.") However, U.C.C. section 9-203 is not a standalone provision granting such rights. The comment itself references part 3, subpart 3 of Article 9, which provides the priority rules as its source of authority. *Id.*

[165] *See id.* § 9-312. Even though the U.C.C. has been amended several times, this section has retained its meaning since its creation.

[166] 995 F.2d 948 (10th Cir. 1993). *See* Weise, *supra* note 131, at 159 (citing PEB Commentary No. 14, § 9-102(1)(b) (June 10, 1994), *reprinted in* 3A U.L.A. 178 (2002)).

the transferring party.[167] The Permanent Editorial Board (PEB) quickly issued PEB Commentary Number Fourteen condemning the Tenth Circuit's decision.[168] If a trier of fact is willing to recognize that the predictability sought for resolving priority disputes is found by applying the principles, rather than the language, of section 9-318, then the provisions of section 9-330 and section 9-322 would remain applicable. Thus section 9-318, read literally, could remain a pathway for a future court to decide in favor of a stripped-payment purchaser in resolving a priority dispute with a subsequent possessor of the chattel paper who gave value. Even applying such an interpretation, ambiguity remains.

*B. Incentives to Behave Badly – Nefarious Double-Dippers*

Critics of the decision in *Commercial Money Center* argue that the result may encourage sellers/transferors of leases to attempt to sell the interest in the revenue streams multiple times, shifting the risk of loss to subsequent purchasers.[169] With a sale of payment streams, a subsequent purchaser who gives value and takes possession of the underlying chattel paper with no actual knowledge of rival interests will be left with an inferior claim. In reality, the incentive for sellers to resell collateral is no greater than it was prior to the Code's adoption of payment intangibles. Rather, the likelihood of a second acquirer detecting a previous security interest in the payment stream is reduced. Unfortunately, the subsequent acquiring party cannot reduce its exposure to loss through additional due diligence.[170] Due to automatic perfection, neither a filings search nor possession of the underlying leases would protect the acquiring party against the risk of prior transfer or provide evidence of the same.[171]

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[167] 995 F.2d at 958.

[168] *See* PEB Commentary No. 14, *supra* note 166, at 182.

[169] *See* Schwarcz, *supra* note 9, at 277 (noting that a risk exists that a purchaser of chattel paper may be buying such paper without the payment streams if dealing with a dishonest transferor); *see also* Kaim, *supra* note 76 (arguing that dishonest lessors will have an additional inducement to resell the same asset multiple times).

[170] *See* Christenfeld & Melzer, *supra* note 7 (noting that traditional due diligence measures cannot entirely protect against prior fraudulent or duplicative transfers).

[171] *Id.*

Readers may find unsettling the shift in the reselling calculus that now appears to favor fraudulent or negligent resales. More troublesome, however is the evisceration of predictability previously guaranteed to a possessor of chattel paper. What this means in terms of actual altered behaviors in the finance marketplace is unclear. To a certain extent, buyers should anticipate discounting as financiers monetize the risk of purchasing collateral that could be affected by a prior sale of payment intangibles.[172] Therefore, all lessors are likely to receive lower returns on lease sales due to the existent risk of a prior transfer of the fractionalized payment streams,[173] regardless of whether any lessors are ever induced to act fraudulently by the reduced likelihood of being caught.[174]

### *C. Shifting Collateral—The Potentially Problematic Issue of Assigning Stripped Payment Streams and the Underlying Lease in a Single Document*

In *Commercial Money Center*, the B.A.P held that stripped payment streams are analytically severable from their associated equipment leases.[175] Thus, two supposedly equivalent transactions (for example, the transfer of a lease and the transfer of said lease's payment stream) could be treated differently, even though both assets were transferred in a single document. This type of determination regarding payment stream stripping presents not only characterization issues, but also impairs the predictability of priority determinations, in favor of a formalistic approach.

While the shifting of collateral is a potential problem, this supposed manipulation of the general rules of Article 9 does not seem to have manifested itself in the marketplace. After review-

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[172] *See* Frisch, *supra* note 6, at 9 (noting that ambiguity in priority rules should adversely impact the value of the disputed collateral).

[173] *See id.* at 30 n.94 (stating that such a discounting effect is likely to occur in any case involving automatic priorities).

[174] No subsequent cases to date have been reported regarding improper attempts to take advantage of automatic perfection for the purpose of defrauding subsequent acquirers.

[175] *See* NetBank FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 478-79 (B.A.P. 9th Cir. 2006).

ing the analysis above, it is difficult to believe that a financier would structure an acquisition of an equipment lease portfolio by using stripping solely to take advantage of automatic perfection. Such a strategy, without more, would be reckless to say the least.[176] A prudent financier would always file a financing statement, if only to mitigate the risk that the transaction be classified as a loan rather than a sale, thus negating automatic perfection in a fell swoop.[177] In addition, such a filing is likely to be beneficial, though not necessarily dispositive in protecting the order of priority.[178] As this shifting of collateral has the potential to alter, allegedly without much benefit, the well thought out framework of Article 9, courts may also be more willing to rely on traditional concepts of market efficiency and predictability in deciding future cases.[179]

### *D. Increased Costs—"B[e]aring" the Price of Change*

The costs associated with allowing automatic perfection of payment intangibles appears to be fairly high relative to any

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[176] Stern, *supra* note 7, at 209.

[177] *See* Posting of Donald J. Rapson, derapson@infionline.net, to http://lists.washlaw.edu/mailman/listinfo/ucclaw-l/ (Sept. 29, 2006) (on file with author); *see also* U.C.C. § 9-309(3) (2005).

[178] Although a subsequent party giving value and taking possession of chattel paper has no obligation to do a filing search, such searches are routine in these types of financial transactions. *See* § 9-330 cmt. 6 (noting that purchasers of chattel paper are "not required as a matter of good faith to make a search in order to determine the existence of prior security interests").

[179] *See* Frisch, *supra* note 6, at 11 (noting that the tenets behind prohibiting stripping of payment streams from mortgages are essentially the same as they would be with leases and their payment streams, and therefore, the merger doctrine could be used to prevent such stripping altogether) (citing Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 446-51 (1979) (arguing that an instrument is not just proof of the underlying debt, rather it is the debt itself)). "[T]he idea that the piece of paper on which the bill was written or printed should be treated as if it–the piece of paper–was itself the claim or debt which it evidenced. . . . At one stroke [this doctrine] drastically simplified the law of negotiable instruments, to the benefit of both purchasers and the people required to pay the instruments." Gilmore, *supra* at 449; *see also* Jacob Cohen, Comment, *Animal, Vegetable, or Mineral?*: In re Commercial Money Center *and the Classification of Payment Streams "Stripped" from Chattel Paper*, 39 U. TOL. L. REV. 861, 884-85 (2008) (noting that a court could analogize the fractionalization of leases to that of real property, and, as with real property, entertain an argument for merger by finding that any time a party can come into possession of both the underlying lease and the stripped payment streams, such interests would be merged).

benefits.[180] These costs are both directly and indirectly related to the issue of priority. For example, forty-seven million dollars was poised to change hands in the *Commercial Money Center* case based solely on a determination of whether the financier had automatically perfected its interest. In losing that argument, the financier's entire claim was trumped by the trustee in bankruptcy proceedings.[181]

Indirect costs also abound. As mentioned above, financiers will now include a discount rate for every transaction in which there is any chance of a prior interest trumping their own. Thus, every seller of equipment leases will likely receive less value for his lease portfolios than the market would otherwise dictate. This discount rate results from the uncertainty of superpriority statutes in resolving disputes through possession, and hedges against the risk of a trier of fact re-characterizing a sale as merely a loan.[182] Parties to such financing structures should expect several factors to drive up transaction costs as the marketplace tries to alleviate these risks, including increased due diligence,[183] account spot-checks to determine collateral payment histories, unnecessary filing fees from conservative financiers, "legending"[184] of individual leases to provide notice to subsequent acquirers, and purchasers of payment intangibles demanding possession of the underlying chattel paper. These costs should be unnecessary for parties who automatically perfect their interests. However, given the unpredictability of the judicial treatment of automatic perfection, many of these measures will likely be adopted to assure certainty of outcome. As a result, the benefits of automatic perfection are severely undermined, and the predictability sought in commercial transactions has been diminished.

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[180] *See* Frisch, *supra* note 6, at 10-11.

[181] *See* NetBank FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 469-72 (B.A.P. 9th Cir. 2006).

[182] *See* Schwarcz, *supra* note 9, at 276 (noting that the problems regarding priority ambiguity and non-perfection exist independently of one another).

[183] *See* Stern, *supra* note 7, at 209 (noting that at the very least, something greater than the standard U.C.C. filings search will need to be employed).

[184] *See supra* note 8 and accompanying text (describing the commercial practice of legending chattel paper).

Despite such costs, common sense suggests the ruling in *Commercial Money Center* also carries a benefit. Indeed, the decision upholding automatic perfection of an interest in payment intangibles has not been uniformly derided.[185] Nevertheless, practitioners and academics have generally struggled to articulate the benefits of fractionalizing payment streams.[186] Several theories have emerged suggesting potential tax benefits (including the ability to depreciate the leased equipment), the ability to avoid filing costs, and retaining the residual value in the underlying equipment;[187] yet none of the benefits proffered require fractionalization.[188] If traditional finance structures are able to provide similar treatment without requiring a restructuring of the priority rules in Article 9, the question must be: What can or should be done to alleviate the risks of uncertainty and the associated costs brought about by the arguably correct interpretation of stripped payment streams as payment intangibles?[189]

## III. CORRECTING THE PROBLEM—A QUESTION OF INTERPRETATION OR DRAFTING?

A radical departure from the current approach could require an acquirer of payment intangibles to file a financing statement in order to perfect his interest. This type of fix immediately solves the problem of hidden priorities with payment

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185 *See* Schechter, *supra* note 74, at 70 (noting that decision appears to be the first reported decision of its kind holding that an automatically perfected interest could prevail over a bankruptcy trustee); *see also* Kaim, *supra* note 76, at 884 (stating that the decision is being heralded as a victory within the securitization industry, and that any additional perfection requirements could "function as an insuperable barrier, chilling the growing lease rental payment stream segment of the securitization market") (citing BOND MARKET ASSOCIATION, AN INVESTOR'S GUIDE TO ASSET-BACKED SECURITIES 1, 2 (2004)).

186 *See* Posting of Donald J. Rapson, *supra* note 177; *see also* Frisch, *supra* note 6, at 18 (noting that the case for allowing the fractionalization of payments is unconvincing at best and is greatly surpassed by the potential costs).

187 *See* Frisch, *supra* note 6, at 18 (citing Letter from James S. Cochran, *supra* note 33, app. 1 at 4-6).

188 *See* Letter from James S. Cochran, *supra* note 33, app. 1 at 6.

189 *Id.* (noting that the favorable benefits sought by parties attempting to fractionalize payment streams from equipment leases have long been available through past practices and present very little inconvenience in light of the greater need for uniformity and predictability).

intangibles by requiring certain levels of notice, but it also imposes on parties dealing in loan participations the very transactional costs the previous revisers tried to avoid. Alternatively, several drafting and interpretation proposals could resolve the issue without imposing such costs. As with any statutory problem, the reporters could simply amend the applicable text to better accomplish the intended goals of Article 9. Subparts A and B below detail and critique several proposed amendments offered by the Uniform Commercial Code Committee of the California State Bar Business Law Section and also propose a different drafting solution. Aside from simply amending the statutory language, reinterpreting the current language in a strict-constructionist manner or applying the common-law doctrine of merger to the treatment of payment intangibles could ensure that a good-faith subsequent purchaser of collateral without knowledge of a prior transfer maintains a senior priority interest over the undisclosed prior interest. These two options are detailed in Subpart C below.

### *A. You Can Always Make Amends—Dealing with Priorities*

The California State Bar Uniform Commercial Code Committee proposed two amendments to solve the problems of stripped payment streams. Both are straightforward, but neither may be practical in the short-term.[190] The first proposal deals with the secret priority problem by denying automatic perfection to payment intangibles derived from chattel paper.[191] Additionally, the proposal seeks to amend section 9-318(b), which suggests a subsequent possessor cannot acquire a greater interest in the chattel paper through possession because the purchaser of the payment streams automatically perfected its interest.[192] The amendment would clarify that subsequent purchasers who take possession of the chattel paper would have rights superior to a prior purchaser who did not perfect by ei-

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[190] *Id.* at 7-8 (noting amendments to U.C.C. sections 9-309, 9-318, 9-322, and 9-330 that may solve the priority problems caused by the automatic perfection of payment intangibles); *see also infra* notes 203-208 and accompanying text.

[191] *See* Letter from James S. Cochran, *supra* note 33, at 7-8.

[192] *Id.*

ther possession or filing, thereby excluding those who perfect automatically.[193] The second proposal would ensure that the superpriority rules of section 9-330(b) explicitly apply to conflicting interests between chattel paper and payment intangibles, and that subsequent possessors of chattel paper will have priority in both the chattel paper and its proceeds under section 9-330(c).[194] Unlike modifying definitions, these amendments do not require restructuring the Code. As the revisers found, defining "loan participation" and "financial institutions" to provide automatic perfection solely to loan participations proved overly problematic.[195] As such, the category of payment intangibles is larger by design than was perhaps initially sought.[196]

If revised Article 9 is to be amended, then a definitional solution, though potentially more complex than an ad hoc resolution because of the cascading effects of the interrelationships in Article 9, may provide the optimal outcome. As mentioned above, various commentators have argued for the inseparability of payment streams from chattel paper in somewhat analogous situations.[197] One definitional approach to implement this type of inseperability would be to amend the definition of chattel paper to include payment streams derived from chattel paper. The current definition of chattel paper, as argued above, likely does not encompass stripped payment streams because there is no record evidencing the monetary obligation—there is only the

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193 *Id.*

194 *Id.*

195 *See* Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1372 (1999) (noting the original proposal was to except from the filing requirement the sale of payment intangibles between "financial institutions").

196 *See* Cohen, *supra* note 179, at 880 & n.163 (quoting Declaration of Charles W. Mooney, Jr. ¶ 10, Kipperman v. Netbank (*In re* Commercial Money Ctr., Inc.), 56 U.C.C. Rep. Serv. 2d 54 (Bankr. S.D. Cal. 2005) ("[I]t was and remains my understanding, and I believe that of the Drafting Committee, that the residual category of payment intangibles is not limited to rights to payment arising out of loan participations.")).

197 Some commentators argue for inseparability by utilizing a doctrine of merger that analogizes the interests in chattel paper to real property and easements, or the inseverability of rights and obligations under a negotiable instrument. *See* Gilmore, *supra* note 179, at 449; *see also* Cohen, *supra* note 179, at 884-85; Frisch, *supra* note 6, at 19 (citing RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4 (1997) (noting that a mortgage separated from the obligation cannot be enforced) and Carpenter v. Longan, 83 U.S. 271, 276 (1872) (holding that the "debt is the principle thing and the mortgage is an accessory" in arguing that the two are inseparable)).

monetary obligation.[198] For instance, the drafters could append section 9-102(b)(11) with a clause providing that "chattel paper" specifically includes any monetary obligations deriving directly from chattel paper.[199] On the other hand, simply redefining "payment intangibles" or the catchall "general intangibles" to exclude fractionalized payments would be insufficient and may likely exacerbate problems by requiring courts to apply a label to the payment streams that is not borne out by the statutory language.[200]

### *B. You Can Always Make Amends Redux—Shifting Collateral Through Drafting*

Hypothetically, current judicial interpretation of the definition of payment intangibles allows for the possibility of shifting collateral types by using certain contractual language.[201] In *Commercial Money Center*, the court held that language that acts to strip the payment streams from the underlying paper, even if done in the same document that transfers all other underlying rights, is sufficient to create the separate collateral.[202] This holding makes payment streams analytically severable from the equipment leases once the payment streams are

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[198] Cohen, *supra* note 179, at 871.

[199] *See* U.C.C. § 9-102(a)(11) (2005). The first sentence of section 9-102(a)(11) provides "'Chattel paper' means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods." The proposed alternative would add the following clause after "goods": "including specifically, any monetary obligations deriving directly or otherwise assigned separately from chattel paper." U.C.C. section 9-102(a)(11) cmt. 5(b) and (d) would likewise be revised to note that the amendment was intended specifically to deal with fractionalized payment streams under chattel paper and was intended specifically to alter the holding in *Commercial Money Center* that such stripped payment streams be classified as payment intangibles.

[200] *See* Cohen, *supra* note 179, at 877 (noting that the stripped payment streams could arguably be classified as "accounts," but that such a reading may not be "a natural reading of the Code").

[201] *See supra* notes 172-77 and accompanying text. The shifting of collateral is an attempt to reclassify chattel paper collateral as payment intangible collateral in order to avail oneself of the automatic perfection granted to purchasers of payment intangibles.

[202] NetBank FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 478 (B.A.P. 9th Cir. 2006).

stripped, likewise altering their respective treatment under Article 9.

A second proposal for amendments to Article 9 put forth by California's Uniform Commercial Code Committee provides four specific amendments to prevent possible shifting of collateral. Three of the four propositions put forth to correct this problem are definitional or technical, and touch on the same or similar code sections as the prior proposals.[203] The fourth seeks to add a new provision to Article 9, providing that any separate assignment of payment rights from chattel paper or an instrument, however accomplished, will be construed as an assignment of the chattel paper or instrument respectively.[204] This second proposal would likely resolve the hierarchical ambiguity in the Article 9 priority rules resulting from the *Commercial Money Center* decision. However, treating an assignment of payment rights as an assignment of the chattel paper itself, essentially preventing separation of the interests,[205] may not be the only solution.

Another possible resolution may be to treat the assignment of payment rights in chattel paper or an instrument as an assignment of proceeds instead of an assignment of the respective chattel paper or instrument.[206] Such treatment would deal with the "shifting collateral" problem by preemptively classifying such a transfer as "a transfer of proceeds of the collateral" and not as "separate collateral." This approach would further resolve

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[203] *See* Letter from James S. Cochran, *supra* note 33, at 7-8 (proposing to amend section 9-102(a)(11) so that the definition of "chattel paper" includes the monetary obligations that are represented by the related records; section 9-102(a)(47) so that the definition of "instrument" includes the right to the payment of any monetary obligation represented by the related instrument; and sections 9-318(b) or 9-322(c) to provide that a subsequent purchaser of chattel paper or an instrument who takes possession and otherwise meets the requirements in section 9-330 will have a "superpriority" in the payments represented by the underlying chattel paper or instrument).

[204] *Id.* The proposal provides that the stripping of such payment streams, whether done in the agreement where other rights are also separately assigned or otherwise, would not create a separate type of collateral (i.e. payment intangible, general intangible, account, etc.). The proposal suggests including such language in a new subsection to section 9-203. *Id.*

[205] *See infra* notes 209-216 and accompanying text (discussing the potential applicability of the merger doctrine to payment intangibles and their underlying chattel paper).

[206] U.C.C. section 9-203 may also be a suitable home for such an amendment, since subsection (f) deals with proceeds, and subsection (g) deals with the codification of the common-law doctrine of collateral following the right to payment. *See supra* note 204 and accompanying text.

the priority problem identified in Part III(A) by making use of the Article 9 rules for priority disputes involving the proceeds of collateral.[207]

Theoretically, either redrafting alternative should provide a resolution to the potential collateral shifting problem, but the latter provides a cleaner analytical approach to the problem. Yet it is unclear whether any concerns regarding shifting collateral have been realized, nor is it clear to what extent, if any, a party would benefit from attempting to shift collateral in this manner. However, resolving the priority concern would probably alleviate, if not eliminate altogether, any potential shifting collateral concern or any price discounting done because of such potential problem. Presumably parties structure their transactions as sales of payment intangibles to avail themselves of the automatic perfection defense. Once that benefit is removed, the primary incentive to structure a transaction in this manner is eviscerated, and as such the collateral shifting problem disappears.[208]

### *C. Immediate Answers: Common Law Merger and/or Renewed Analysis*

#### 1. Indivisibility—The Prohibition of Stripping

Classifying payment intangibles as chattel paper has the allure of providing a well-devised priority system that provides predictable outcomes; however, that change alone does not address whether payment streams should be assignable separate from the underlying leases. Under the theory that payment rights and the underlying chattel paper are inseparable, the common law merger doctrine could be employed to prohibit such severances.[209] Even though the merger doctrine is not provided

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[207] *See* U.C.C. § 9-322(c) (2005) (providing that a subsequent purchaser of chattel paper that takes possession and qualifies for priority under section 9-330 would also take priority over a conflicting security interest in the proceeds of that chattel paper).

[208] "Take away the motive and you take away the sin." *See supra* note 1 and accompanying text.

[209] *See* Gilmore, *supra* note 179, at 449 n.15 (outlining the history of the merger doctrine and noting its automatic application to many types of negotiable commercial paper).

for specifically in Article 9, such common law doctrines are often used to supplement the Code.[210]

Under the theory of common law merger, separate and distinguishable rights or obligations become legally inseparable. The doctrine holds that if any such item is separated, by operation of law, it shall be remerged with its constituent parts.[211] Variations of the doctrine have been utilized in many legal fields, including torts,[212] real property law,[213] criminal law,[214] civil procedure,[215] and intellectual property law.[216] Given the historical use of the merger doctrine in the legal field, and the theory of inseparability behind it, there is no reason it could not be utilized in the present case.

Prohibiting the separation of payment streams from chattel paper, *for the purposes of priority under Article 9*, will arguably affect neither the parties' freedom of contract,[217] nor their ultimate decision to engage in such a transaction.[218] Moreover, this

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[210] *See* § 1-103 cmt. 2 (providing that common law may be used to supplement the provisions of the U.C.C.).

[211] *See, e.g.* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 548-49 (5th ed. 2007) (describing the merger concept as utilized in real estate as "[t]he theory . . . that when a mortgagee's interest and a fee title coincide and meet in the same person, the lesser estate, the mortgage, merges into the greater, the fee, and is extinguished."); *cf.* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.5 (1997) (criticizing the merger doctrine as unnecessarily confusing).

[212] *See* RESTATEMENT (SECOND) OF TORTS § 242 cmts. a-f (1965) (discussing the merger of intangible rights into certain converted documents).

[213] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.5 (2000) (noting that servitudes are terminated by operation of law when the "benefits and burdens" of the servitude and easement are merged in "a single owner").

[214] 22 C.J.S. *Criminal Law* § 18 (2006) (discussing certain limitations in criminal prosecutions of lesser included offenses and felony murders due to the merging of the elements of the crimes).

[215] 49 C.J.S. *Judgments* § 704 (2009) (noting that the merger principle is a subset of the principle of res judicata which prohibits a plaintiff from bringing a subsequent claim of any offense included within the prior claim).

[216] *See* Harris Weems Henderson, *Through the Looking Glass: Copyright Protection in the Virtual Reality of Second Life*, 16 J. INTELL. PROP. L. 165, 178 (2008) (describing the merger doctrine in the field of copyright law as one which prohibits legal protection expressions that "are so closely" interrelated to the underlying ideas as to be inseparable).

[217] U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts.").

[218] 16A C.J.S. *Constitutional Law* § 721 (2005) (noting that freedom of contract is a qualified right subject to reasonable regulations to protect a significant and legitimate public purpose). Furthermore, parties aware of the use of the merger doctrine may make

solution does not require amending Article 9 to distinguish payment intangibles or define chattel paper as including derivative payment streams.[219] The obvious drawback to the utility of implementing the merger doctrine in the context of stripped payment streams is the lack of precedent in this context.[220] The only way to overcome this obstacle with any certainty and without resort to the legislative process would be through subsequent litigation, which may not be forthcoming in the near future given the recentness of the *Commercial Money Center* decision and investors' current preference for safer investment vehicles.[221]

If payment streams are suddenly declared inseparable from chattel paper, one might wonder whether an assignment of proceeds would likewise be affected. In both cases, the end result should be very similar, with the transferee ultimately receiving the payments due. However, the assignment of proceeds and the fractionalization of payment streams themselves are formalistically very different. The difference, and the key reason that classifying fractionalized payment streams as payment intangibles caused priority concerns, is that third parties concerned with priority rights in assigned payment streams may have their rights unknowingly affected. Nevertheless, the mechanisms for perfecting priority interests for assignments of proceeds and determining which corresponding interest would triumph are already contemplated within the special rules created

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any necessary pricing adjustments regarding any reallocation of risk prior to closing on their transaction.

[219] Of course, the revisers could specifically amend Article 9 to codify the result. The essential difference would, therefore, be in how the result comes about, either via judicial or legislative processes.

[220] *Compare* David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747, 747-49, 757 (1995) (discussing the concept of merger in the context of negotiable instruments under Article 3), *with* Frisch, *supra* note 6, at 10 (analyzing the application of the merger doctrine in regards to promissory notes and mortgages).

[221] *See* Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1514-16 (2008) (noting investors' increased preference for asset-backed securities as well as for deals that utilize SPVs in order to reduce risk of failure, more accurately price the value of the securities, and avoid any problems that may arise if the originator of the securities were to enter bankruptcy).

for them under the framework of Article 9.[222] Therefore, given the fundamental difference in statutory treatment, assignments of proceeds should not be prohibited under the merger doctrine if it is adopted with regards to severed payment streams.

While the merger doctrine has not previously been employed in the context of payment intangibles under Article 9, its widespread use in multiple legal fields, its adaptability to this particular situation, and the ease with which it may be implemented justifies an in-depth examination by the next court confronted with this issue. The merger doctrine presents a more cost-efficient solution by eliminating the increased due diligence costs borne by acquirers of payment streams. It further mitigates the priority risks created by the potential for hidden interests and the requirement that all purchasers of payment streams file financing statements. While the application of the merger doctrine presents a sound, albeit untested mechanism for restoring certainty to priority disputes concerning payment intangibles, a closer reading of the comments to Article 9 may provide a similar outcome through a more conservative approach, with either option ensuring a subsequent good-faith purchaser of chattel paper prevails over the possessor of a hidden interest.

### 2. A Closer Look at the Comments May Get You Where You Need to Go

The final proposal for resolving the judicial conundrum regarding stripped payment intangibles is a hyper-textual analysis of section 9-322, comment 8.[223] Although on its face, section 9-330 seems inapplicable to a priority conflict between an interest in chattel paper and a payment intangible,[224] a closer read-

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[222] *See* U.C.C. § 9-203(f) (2005) (noting that "a security interest in collateral [grants] the secured party the rights to [the] proceeds" in the collateral under section 9-315); *id.* § 9-315 (detailing a "secured party's rights on [the] disposition of collateral and in proceeds"); *id.* § 9-322(c) (providing for the resolution of priority disputes and for the disposition of the proceeds of the collateral).

[223] *See supra* Part II.A.1.

[224] *See* § 9-330(a)-(b) (noting that a subsequent purchaser of chattel paper who meets all the other statutory requirements "has priority over a [conflicting] security interest *in the chattel paper*") (emphasis added).

ing of the comments belies that interpretation.[225] Such a close reading depends on a court's willingness to look past the face of the statute and interpret the statutory language and comments more in line with the purposes of Article 9.

As argued above, the hook for applying section 9-330(a) or (b) comes from comment 8 to section 9-322, which provides that "[section 9-322] determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral."[226] This argument is predicated on the legal hypothetical that a subsequent possessor of chattel paper who has given new value, in good faith, in the ordinary course of business without knowledge that its purchase violates the rights of another secured party, triumphs in its priority rights as against all others, even though no other challenger exists.[227]

The B.A.P. in *Commercial Money Center* thought this interpretation to be unlikely, but refused to comment further.[228] However, if such an interpretation were in fact adopted, sections 9-322 and 9-330 would give priority to the subsequent possessor in both the chattel paper and its proceeds, as they would be cash proceeds. Nevertheless, this approach is not without obstacles. For one, section 9-330 refers only to conflicting interests "in the chattel paper," suggesting its inapplicability to stripped payment streams. Additionally, although relatively unlikely, equipment leases may no longer qualify as chattel paper once their associated payment streams are stripped, and thus sections 9-322 and 9-330 might be inapplicable.[229] This result occurs because a lease with stripped payment streams does not fall within the strictly construed definition of chattel paper under Article 9, as there is no longer a record that evidences

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[225] *Compare* Posting of Steve Weise, *supra* note 145, *with* NetBank FSB v. Kipperman (*In re* Commercial Money Ctr., Inc.), 350 B.R. 465, 469-72 (B.A.P. 9th Cir. 2006) (noting that section 9-330 would be inapplicable to such an analysis as the court held the collateral was a payment intangible, not chattel paper).

[226] *See* § 9-322 cmt. 8.

[227] *Id.*

[228] *See id.* § 9-322(c) (providing that section 9-322(c) is applicable to "a security interest in collateral which *qualifies* for priority over a conflicting security interest under Section . . . 9-330") (emphasis added).

[229] *See id.* § 9-330(c).

both a "lease of specific goods" *and* a "monetary obligation."[230] Therefore, a subsequent purchaser of "shell" leases arguably acquires chattel paper that has devolved into some other form of collateral.[231] While facially interesting, this argument is not likely to prevail on the merits.

Assigning a payment stream under an equipment lease should not reduce the lease to a form of collateral other than chattel paper. Although the right to receive payment streams is legally deemed severed from the underlying lease, fundamentally the monetary obligation still exists. The monetary obligations manifested in stripped payment streams have merely been redirected to a third party. As such, the assignment of the right to receive payment streams should not affect the status of the underlying instrument as chattel paper.

## CONCLUSION

Under the murky cloud of doubt is a ray of hope in the fractionalized payment stream industry that would not foreclose its marketplace altogether, even if the benefits are minimal. Though this type of collateral is probably best characterized as a "payment intangible," under the current definitions, two remedies are immediately available to prevent priority problems arising out of "secret" perfected interests. Courts may decide to adopt the common-law doctrine of merger as a convenient solution that is neither mandated nor prohibited by Article 9, or they may proceed with the analysis suggested in section 9-322, comment 8. The latter approach presupposes that qualms about the modifier "which qualifies" in the introductory language of the statutory text, or the issue of whether lease chattel paper retains such a classification once its payment streams have been stripped, are adequately resolved.[232] In any case, a court will likely favor one of these approaches in light of the dangers to

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[230] *See id.* § 9-102(a)(11) (defining "chattel paper").

[231] *See* Cohen, *supra* note 179, at 883 (arguing that what a purchaser has acquired is either "goods" or "general intangibles," and therefore the section 9-322 comment 8 analysis should not apply as there is not even one conflicting interest in chattel paper) (citation omitted).

[232] *See id.* § 9-322(c).

predictability in the secured transactions marketplace that a contrary ruling would engender.

The other alternatives briefly discussed, whether they be a re-argument for the classification of fractionalized payment streams as "chattel paper" or the argument for classification as "accounts," are predicated on a tortured reading of Article 9. If adopted, these approaches could cause greater confusion among competing priority claimants based on less-than-rigorous judicial analysis, especially if jurisdictional splits evolve. A better result, at least until the Code is again revised, is to resolve priority conflicts under the merger doctrine or a hyper-textual reading of section 9-322. Either approach could be easily adopted with little cost to the participants in the stripped-payment-stream marketplace. More importantly, the adoption of either potential solution should work to prevent the next "innocent" purchaser from being legally forced to bare all.

# RECENT DECISION

# CIVIL RIGHTS—EMPLOYMENT—BEFORE AN EMPLOYER MAY LAWFULLY TAKE RACE-BASED ACTION TO REMEDY A PRACTICE THAT HAS A DISPARATE IMPACT, THE EMPLOYER MUST HAVE A STRONG BASIS IN EVIDENCE TO BELIEVE THAT IT WILL BE SUBJECT TO DISPARATE-IMPACT LIABILITY IF IT FAILS TO TAKE THAT ACTION

## I. FACTS

In 2003, New Haven, Connecticut firefighters took a promotional exam to qualify for promotion to the rank of lieutenant or captain.[1] The interested candidates invested both personal time and money to prepare for the exam over a three-month period.[2] The results of the exam revealed that white candidates had outperformed minority candidates.[3] Fearing disparate-impact li-

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[1] Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009). New Haven (City) hired Industrial/Organizational Solutions, Inc. (IOS) to develop the exam. *Id.* at 2665. IOS developed the written and oral portions of the exam by performing job analyses of the lieutenant and captain positions, which included interviews and ride-alongs with incumbent officers. *Id.* IOS oversampled minority firefighters during the job analyses in order to prevent unintentionally favoring white firefighters on the examination. *Id.* IOS chose assessors for the oral portion of the exam from outside of Connecticut. *Id.* at 2666. The assessors were sixty-six percent minority and included a three-member panel—one white, one black, and one Hispanic. *Id.* at 2666, 2668.

[2] *Id.* at 2666, 2681. IOS compiled the source material, approved by the City's fire chief, and the City provided a list of the sources used for the exam, as well as the specific chapters from which the questions were derived, to the candidates. *Id.* at 2665-66. Proponents of the exam later testified that the source material represented "nationally recognized," "accepted standards" for firefighting, while opponents stated that the materials were not relevant to firefighting practices in New Haven. *Id.* at 2667. The materials cost approximately $500. *Id.*

[3] *Id.* at 2664. Twenty-five of forty-three white candidates passed the lieutenant examination, while only six of nineteen blacks and three of fifteen Hispanics passed. *Id.*

ability, the New Haven Civil Service Board (CSB) conducted a series of meetings to determine whether to certify the exam.[4]

The City's counsel, Thomas Ude, first raised the issue of disparate impact, stating that the statistical disparity in the results was enough to justify the City's use of "race-conscious remedies."[5] Conversely, Chad Legel, the Vice President of IOS, the company the City had hired to design the promotional examination, argued that both the written and oral examinations were based on critical skills as determined by the job analyses performed by his company.[6] Another witness, Janet Helms, an expert on the impact of race as it relates to test performance, questioned the validity of the job analyses performed by IOS.[7] Helms noted that sixty-seven percent of the job analysis questionnaires were completed by white firefighters.[8] Because "different groups perform the job differently," Helms reasoned that the exam questions might have unduly favored the white candidates.[9] However, Helms testified that the results of the examination were not atypical and that a disparity would have existed regardless of the test administered.[10]

An IOS competitor, Christopher Hornick, testified to the Board that although the disparity of the exam scores was somewhat higher than what he had seen in other areas of the country, the impact was "generally in the range that [he had] seen professionally."[11] He further offered that the use of assessment centers might have been a valid alternative to the written and oral examinations.[12] Specifically, Hornick stated

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at 2666. Sixteen of twenty-five whites passed the captain examination, while only three of eight blacks and three of eight Hispanics passed. *Id.*

[4] *Id.* at 2666-71. According to the city charter, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who pass the exam. *Id.* at 2665. The city charter then applies a "rule of three," which requires the vacant captain or lieutenant position to be filled from the top three scorers on each respective certified list. *Id.*

[5] *Id.* at 2666-67.

[6] *Id.* at 2668.

[7] *Id.* at 2669.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 2669. In subsequent meetings, Ude continued to advocate the use of equally valid, alternative testing methods such as the assessment centers proposed by Hornick. *Id.* at 2670. Yet, firefighter Frank Ricci pointed out during his testimony that assess-

that assessment centers better identified the best candidates while "demonstrat[ing] dramatically less adverse impacts."[13] Results from the nearby city of Bridgeport also demonstrated the viability of alternatives.[14] Bridgeport found that changing the weight of examinations to favor the oral portion of the exam more closely resembled the reality of the job and resulted in a better representation of minority candidates.[15]

With both the advocates and opponents of the examination threatening discrimination lawsuits, the City discarded the results.[16] Subsequently, the firefighters who passed the examinations filed suit against the City for discrimination in violation of Title VII of the Civil Rights Act of 1964.[17] The firefighters filed suit in the United States District Court for the District of Connecticut seeking summary judgment.[18] The district court granted summary judgment in favor of the City, and on appeal, the Court of Appeals for the Second Circuit affirmed.[19] The United States Supreme Court granted certiorari and held: reversed.[20] Before an employer may lawfully take race-based action to remedy a practice that has a disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take that action.[21] An employer has a strong basis in evidence to believe that it will be subject to disparate-impact liability when the practice is not job related and consistent with business neces-

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ment centers were not available to the Fire Department at the time of the promotional exams and would take several years to develop. *Id.*

[13] *Id.* at 2694 (Ginsburg, J., dissenting).

[14] *See id.* at 2693.

[15] *Id.* at 2693.

[16] *Id.* at 2664 (majority opinion).

[17] *Id.* The plaintiffs included seventeen white firefighters and one Hispanic firefighter. *Id.* at 2671. The firefighters claimed that by failing to certify the exams, the City had engaged in race-based discrimination in violation of the disparate-treatment provision of the Act. *Id.* at 2664, 2671. The firefighters also brought a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment; however, citing *Atkins v. Parker*, 472 U.S. 115, 123 (1985), the Court decided not to address the constitutional claim because the case was disposed of within the statutory claim. *Ricci*, 129 S. Ct. at 2664-65, 2672.

[18] Ricci v. DeStefano, 554 F. Supp. 2d 142, 144-45 (D. Conn. 2006).

[19] *Ricci*, 129 S. Ct. at 2671-72.

[20] *Id.* at 2672.

[21] *Id.* at 2677.

sity, or when an equally valid, less discriminatory alternative to the practice exists and the employer fails to adopt the alternative.[22]

## II. Related Law

*Ricci* meets at the intersection of the statutory doctrines of disparate treatment and disparate impact, while importing a constitutional standard into its analysis.[23] Accordingly, an understanding of *Ricci* demands an examination of both Title VII doctrines and an investigation into the origin of the strong-basis-in-evidence standard.[24]

### *A. Disparate Treatment*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, *because of such individual's race*, color, religion, sex, or national origin . . . ."[25] Thus, Title VII defends employees from intentionally discriminatory actions by employers.[26] This practice, known as disparate treatment, is the most straightforward form of discrimination prohibited by Title VII and requires proof of an employer's discriminatory intent in taking a particular job-related action.[27]

*McDonnell Douglas Corp. v. Green* established the analysis a court must follow and the shifting burdens of proof imposed on the parties in a disparate-treatment claim.[28] In *McDonnell Douglas*, a black employee who had participated in protests that disrupted the employer's business brought suit when the company refused to rehire him after a layoff.[29] Ordering a remand on the issue of pretext, the Court outlined the disparate-

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[22] *Id.* at 2678.

[23] *See id.* at 2674-75.

[24] *See id.* at 2672-73.

[25] 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).

[26] *Ricci*, 129 S. Ct. at 2672.

[27] *Id.* (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) and Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

[28] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

[29] *Id.* at 794-96.

treatment analysis.[30] The analysis begins by examining whether the employer made an employment decision based on race.[31] Once the plaintiff establishes a prima facie case of intentional discrimination because of race, the employer is then given the opportunity to demonstrate that a "legitimate, nondiscriminatory reason" existed for the employment practice.[32] As a final step, the employee may rebut by demonstrating that the business justification given by the employer was mere pretext.[33]

### *B. Disparate Impact*

Title VII holds employers liable not only for intentionally discriminatory practices, but also for facially neutral practices that produce a racially disparate result.[34] The Court's decision in *Griggs v. Duke Power Co.* makes clear Title VII's prohibition against practices that have a disparate impact.[35] In *Griggs*, the issue was whether particular employee testing and educational requirements for job assignments and transfers were lawful.[36] The Court held that where the practice is not job related and has a disparate impact on a minority group, it is prohibited although the practice lacks discriminatory intent.[37] The Court looked to the plain language of the Act and reasoned that the intent of Congress was to "achieve equality of employment opportunities," and that in achieving this objective, not only must the intent of the employer be evaluated, but also the impact of

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[30] *Id.* at 802-04, 807.

[31] *See id.* at 802. The plaintiff bears the initial burden of demonstrating that the employment action was taken because of race. *See id.* The Court in *McDonnell Douglas* stated that although methods of establishing a prima facie disparate-treatment claim may differ depending on the facts, the suggested method in the case sub judice required the plaintiff to demonstrate (1) that the plaintiff was a racial minority, (2) that he applied for and was qualified for the job in question, (3) that he was rejected, and (4) that the position remained open and the employer continued to seek applicants having the plaintiff's qualifications. *Id.*

[32] *Id.*

[33] *Id.* at 804.

[34] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[35] *Id.*

[36] *Id.* at 425-26. Duke Power required a high school education for assignment to any department outside of the company's Labor Department. *Id.* at 427. After Title VII became effective, Duke Power instituted an additional requirement of passing two general intelligence tests. *Id.* at 427-28. Neither test was job related. *Id.* at 428.

[37] *Id.* at 431-32.

the practice.[38] In so holding, the Court expanded the interpretation of Title VII to prohibit both disparate treatment and disparate impact.[39] Again looking to the intent of Congress, the Court further held that testing in itself is not prohibited, but must be related to "*job performance*" and consistent with "*business necessity.*"[40]

*Albemarle Paper Co. v. Moody* built on the concept of job relatedness introduced in *Griggs*.[41] *Albemarle* tackled the issue of what an employer whose testing procedures have a discriminatory effect must demonstrate in order to show that the testing practice is job related, as required in *Griggs*, and thus able to withstand Title VII scrutiny.[42] The Court held that the testing procedures implemented by Albemarle failed under Title VII.[43] In making its determination, the Court evaluated the *Griggs* concept of job relatedness in the context of the plant's operation and the history of the testing program.[44]

Not only did the *Albemarle* Court clarify how to evaluate the job relatedness of testing procedures having a disparate impact, the Court also outlined the shifting burdens of the chal-

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[38] *Id.* at 429, 432.

[39] *Ricci*, 129 S. Ct. at 2672-73.

[40] *Griggs*, 401 U.S. at 431, 436 (emphasis added). This portion of the holding is best encapsulated by the Court's closing words that "any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436. The holding in *Griggs* was later codified in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). *Ricci*, 129 S. Ct. at 2673.

[41] Albemarle Paper Co. v. Moody, 422 U.S. 405, 426-27 (1975).

[42] *Id.* at 408. Outside the scope of the instant discussion, *Albemarle* also addressed the standards a court must follow in determining backpay in employment discrimination suits. *Id.* Similar to the plaintiffs in *Griggs*, the plaintiffs in *Albemarle* challenged the lawfulness of Albemarle's testing program, which required candidates for employment to possess a high school diploma and pass both nonverbal intelligence and verbal facility tests. *Id.* at 410-11.

[43] *Id.* at 435-36.

[44] *Id.* at 427. In evaluating job relatedness of the testing procedures, the Court considered the specific operational methods of the plant in relation to the necessity for testing. *Id.* Specifically, the Court examined departmental structure, the interplay between skill and advancement within departments, and whether the technology in use at the facility required a threshold level of intelligence. *Id.* In evaluating the history of the testing program, the Court examined whether the tests were adopted in a "casual fashion," *id.* at 429, bearing little or no relation to the job at hand, or, following EEOC guidelines, were "predictive of or significantly correlated with important elements of work behavior." *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1975)).

lenging party and the employer in a disparate-impact suit.[45] In so doing, the Court introduced an additional step into the disparate impact analysis: whether, at the time of testing, there existed an *equally valid, less discriminatory, alternative means of testing*.[46] If, despite the availability of an equally valid alternative, an employer proceeds with the existing method of testing, the employer is subject to a Title VII violation even though the existing testing methods are found to be job related.[47]

### *C. The Constitutional Standard under Equal Protection Claims*

The *Ricci* majority conducts its Title VII analysis through the lens of the strong-basis-in-evidence standard, a constitutional standard derived from the equal protection claims in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.*[48] In *Wygant*, the Court addressed the issue of whether a policy with the stated purpose of remedying past racial discrimination violated the Equal Protection Clause of the Fourteenth Amendment as it pertains to nonminority educators.[49] The Court held that when a nonminority racial classification challenges a race-based remedial action program, there must exist a "*strong basis in evidence*" that the action was necessary for it to withstand scrutiny.[50] The Court reasoned that the strong-basis-in-evidence standard comported with precedent establishing heightened scrutiny for practices involving race-

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[45] *Id.* at 425. The challenger of the practice establishes his or her prima facie case by demonstrating a statistical disparity in the employer's hiring or promotional practice. *Id.* The employer then rebuts by demonstrating that the practice is job related. *Id.* If the challenger can demonstrate that an equally valid, less discriminatory practice was available to the employer at the time of testing, which the employer chose to disregard, then the challenger can prevail under Title VII. *See, e.g., id.*

[46] *See id.*

[47] *See id.*

[48] *Ricci*, 129 S. Ct. at 2675.

[49] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269-74 (1986). The Board instituted a layoff provision that retained minority educators with less seniority than nonminority educators with greater seniority in an effort to ease racial tensions in the community. *Id.* at 270-72.

[50] *Id.* at 277 (emphasis added).

based classifications.[51] Furthermore, race-based remedial practices impose some level of burden on nonminority classifications.[52] The strong-basis-in-evidence standard ensures that nonminority classifications are not unduly burdened by an overbroad desire to cure general societal discrimination.[53]

The Court in *City of Richmond v. J.A. Croson Co.* further justified the use of the strong-basis-in-evidence standard in matters involving race-based classifications.[54] The *Croson* Court examined whether Richmond's practice of requiring city contractors to award thirty percent of their subcontract expenditures to minority-run enterprises violated the Equal Protection Clause of the Fourteenth Amendment.[55] The Court applied the strong-basis-in-evidence standard to Richmond's policy, opining that strict scrutiny was necessary in all matters of racial classifications because of the danger of stigmatic harm, feelings of racial inferiority, and development of racial hostility.[56] To apply the heightened standard of review, the Court examined whether there was a compelling government interest in adopting the remedial practice and whether the practice was narrowly tailored to meet that end.[57] Ultimately, the Court determined that Rich-

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[51] *See id.* at 279-80. The Court admonished the lower court for using the less stringent "reasonableness" standard to evaluate the necessity of the race-based remedial action. *Id.* at 279.

[52] *Id.* at 282. The burden imposed on nonminority classifications by race-based remedial practices is acceptable when it is spread across society generally and narrowly tailored to meet remedial goals, as in the case of implementing hiring goals. *Id.* Conversely, practices such as the layoffs challenged in the instant case impose a substantial burden on a few individuals. *Id.* at 283.

[53] *See id.* at 276. General societal discrimination lacks the specificity necessary to justify a race-based remedy. *Id.*

[54] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94, 500 (1989). The Court also implied that the strong-basis-in-evidence standard could be applied to constitutional *or statutory* violations involving race-based classifications. *See id.* at 500.

[55] *Id.* at 476-77.

[56] *Id.* at 493-94, 500. The standard is independent of the race of those subject to the race-based classification. *Id.* at 494.

[57] *Id.* at 505-06. The compelling government interest must be in remedying actual past discrimination in the particular field at issue. *See id.* at 505. This statement is true whether Richmond was an active or merely a passive participant in discrimination in the construction industry. *See id.* at 492. However, remedying general past societal discrimination is not a valid compelling government interest for implementing practices that entail race-based classifications. *See id.* at 505. No evidence of discrimination existed in Richmond's construction industry. *Id.* Rather, testimony revealed that minority contracts were simply difficult to obtain. *Id.* at 480. Furthermore, Richmond's race-

mond's remedial policy failed to meet the heightened standard and consequently violated the Equal Protection Clause.[58]

## III. RICCI V. DESTEFANO

### *A. Majority Opinion*

In *Ricci*, the Court first explained Title VII's express prohibition on disparate treatment and the development of the implicit prohibition on disparate impact.[59] It revealed the origins of the interplay between disparate impact and job relatedness, business necessity, and alternative employer testing practices.[60]

The majority began its analysis with the assumption that the City's dismissal of the promotional examinations constituted a discriminatory action: "[T]he City made its employment decision *because of race*. The City rejected the test results solely because the higher scoring candidates were white."[61] Therefore, the basic issue addressed by the Court was whether the City's discriminatory action was defensible.[62] The Court's goal was to provide direction for reconciling disparate treatment and disparate impact when these prohibitions collide.[63]

The Court avoided the extremities proposed by the parties and instead implemented the strong-basis-in-evidence standard.[64] It reasoned that the strong-basis-in-evidence standard

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based remedial practice was not narrowly tailored. *Id.* at 507. The thirty percent minority subcontract requirement was chosen arbitrarily and had no relevant link to any number, except, perhaps, general racial balancing. *Id.* at 486, 507. Additionally, Richmond failed to first consider a race-neutral remedy. *Id.* at 507.

[58] *Id.* at 511.

[59] *Ricci*, 129 S. Ct. at 2672-73; *see supra* Part II.A-B.

[60] *Ricci*, 129 S. Ct. at 2673; *see supra* Part II.B.

[61] *Ricci*, 129 S. Ct. at 2673-74 (emphasis added).

[62] *Id.* at 2673-74.

[63] *Id.* at 2674.

[64] *Id.* at 2674-77. The firefighters first argued that disparate treatment is not defensible by an employer's attempt to avoid disparate impact. *Id.* at 2674. The Court refused to adopt this holding, asserting that only a rule that gives weight to both forms of discrimination will be accepted. *Id.* The firefighters next argued that employers must know with certainty that they have violated the disparate-impact prohibition before they may lawfully engage in disparate treatment as a remedy. *Id.* Yet, the Court again rejected this proposal, reasoning that requiring certainty would halt compliance efforts. *Id.* Alternatively, the City argued that good-faith compliance with the disparate-impact prohibition justifies intentionally discriminatory conduct. *Id.* at 2674-75. The Court also

reconciles disparate treatment and disparate impact by permitting the use of the former to comply with the prohibition against the latter only in limited circumstances.[65]

Before laying out its holding, the Court limited the strong-basis-in-evidence standard to statutory Title VII claims.[66] The Court expressly stated that it did not decide whether meeting the standard would defeat a constitutional claim of discrimination under the Equal Protection Clause.[67] The Court then held that an employer cannot engage in intentional discrimination to remedy an unintentional disparate impact unless there is a strong basis in evidence that it will be subject to disparate-impact liability if it fails to take the discriminatory action.[68] There is a strong basis in evidence that the employer will be liable for disparate impact if the practice is not job related and consistent with business necessity, or an equally valid, less discriminatory practice exists that the employer could have used, but refused to adopt.[69]

The Court then applied the holding to the facts of the case and awarded summary judgment to the firefighters.[70] The majority reasoned that the detailed job analyses performed by IOS, the efforts to ensure that minorities were overrepresented in the oral examinations, and the testimony of IOS competitor, Christopher Hornick, demonstrated that the exams were job related and consistent with business necessity.[71] Moreover, according to the majority, no evidence of valid alternatives existed.[72]

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refused to accept the City's proposed good-faith rule, as such a rule would encourage employers to engage in discriminatory action and hastily dismiss test results with only minimal indication of disparate impact. *Id.* at 2675.

[65] *Id.* at 2676. The Court also reasoned that the strong-basis-in-evidence standard prevents employers from engaging in disparate treatment at the slightest hint of disparate impact, while not forcing them to wait until there is an actual disparate-impact violation. *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 2677.

[69] *Id.* at 2678.

[70] *Id.* at 2678-81.

[71] *Id.* at 2678; *see supra* Part I and note 1.

[72] *Ricci*, 129 S. Ct. at 2679-80. The City claimed that changing the weighting of the oral and written portions of the examination would have provided an alternative that allowed consideration of two black candidates. *Id.* at 2679. The Court, however, did not consider changing the weighting of the exam to be an equally valid alternative. *Id.* In

In its conclusion, the majority determined that the promotional examinations were related to job performance, and that equally valid, less discriminatory alternatives were unavailable.[73] Thus, the City fell short of demonstrating a strong basis in evidence that it would be subject to disparate-impact liability, and, consequently, set aside the test results in violation of Title VII.[74] Mere fear of litigation based on the statistical results of the promotional examination did not justify the injury sustained by those firefighters who had invested personal and financial resources in preparation for the exam.[75]

### *B. Justice Scalia's Concurring Opinion*

Agreeing fully with the majority, Justice Scalia noted that the decision did not address the constitutionality of disparate-impact provisions.[76] He argued that race-based remedial actions are inherently discriminatory.[77] Whereas the federal government is constitutionally prohibited from engaging in race-based discrimination under the Equal Protection Clause, its mandate of disparate-impact provisions results in discrimination by proxy.[78] Justice Scalia concluded his concurring opinion with a call to consider the impending conflict between disparate impact and the Constitution.[79]

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fact, changing test scores in this manner would also have likely resulted in a violation of Title VII. *Id. But see infra* note 89 and accompanying text. For similar reasons, the Court refuted the City's second suggested alternative of "banding," which allowed consideration of multiple candidates for each rank under "the rule of three." *Id.* at 2679-80; *see also supra* note 4 and accompanying text. Lastly, the Court deemed the use of assessment centers as an invalid alternative. *Ricci*, 129 S. Ct. at 2680. There was no evidence assessment centers were available as an alternative at the time of the examinations, nor was there any evidence that the assessment centers would have had a less discriminatory impact. *Id. But see infra* note 89 and accompanying text.

[73] *Ricci*, 129 S. Ct. at 2681. *But see infra* note 89 and accompanying text.

[74] *Ricci*, 129 S. Ct. at 2681.

[75] *Id.*

[76] *Id.* at 2681-82 (Scalia, J., concurring).

[77] *Id.* at 2682.

[78] *Id.*

[79] *Id.* at 2683.

### *C. Justice Alito's Concurring Opinion*

Justice Alito discussed disparate-treatment claims within the framework of a two-part, legitimacy analysis that contains both an objective and a subjective component.[80] Whereas the majority's holding and the dissent differ on the objective component, Justice Alito argued that even if the dissent had been adopted, the facts at hand would have nonetheless failed the subjective component.[81]

Justice Alito asserted that the dissent's analysis ignored significant facts that could have led a reasonable juror to find that the City's subjective intent was to "placate a politically important racial constituency," rather than the legitimate intent of avoiding disparate-impact liability.[82] In forming his argument, Justice Alito relied on evidence that Rev. Boise Kimber, a politically influential African-American leader and longtime supporter of the Mayor, had influenced Mayor DeStefano and his executive officials to discard the test results.[83] Kimber had voiced his opposition to certification of the test results both privately to the Mayor's officials and at publicly-held hearings.[84] Justice Alito pointed to evidence in the record that the Mayor's office had decided to discard the test results prior to the CSB deliberations on the matter of disparate impact.[85] Consequently, Justice Alito argued that a reasonable juror could believe that fear of disparate-impact liability was merely a pretext for cloaking the City's real intent: appeasing a politically influential group.[86]

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[80] *Id.* (Alito, J., concurring). Justice Alito asserted that when an employer is subject to a disparate-treatment claim, the analysis begins by determining whether the objective reason for the employer's discriminatory action was legitimate. *Id.* The second part of the analysis focuses on whether the subjective intent of the employer was legitimate or merely a pretext for unjustifiable discriminatory action. *Id.* Justice Alito determined that the majority's holding fits within the objective analysis: if there was a strong basis in evidence that the employer would have been subject to disparate-impact liability, then the discriminatory action of the employer was legitimate. *Id.*

[81] *Id.* at 2683-84.

[82] *See id.* at 2684.

[83] *Id.* at 2684-85.

[84] *Id.* at 2684-86.

[85] *Id.* at 2686.

[86] *Id.* at 2687-88.

### *D. Justice Ginsburg's Dissenting Opinion*

The dissent began with an assault on the majority's interpretation of the facts. Justice Ginsburg argued that the majority ignored the extensive history of discrimination in the profession of firefighting.[87] Her opinion attacked the ease with which the New Haven nonminority captain and lieutenant candidates obtained study materials, as opposed to their minority counterparts.[88] The dissent then discussed the City's failure to employ alternative testing methods such as changing the weighting of the written and oral portions of the examination or using assessment centers.[89] The dissent rounded out its initial discussion by rejecting the majority's view that the City's consideration of race in reviewing the test results was discriminatory.[90] Instead, the dissent concluded that the City's actions were "race-neutral," as all candidates were denied promotion and would have to engage in an alternative examination.[91]

The dissent then accused the majority of disregarding the holdings in *Griggs* and *Albemarle*.[92] Supporting this claim, the dissent argued that the majority viewed disparate treatment

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[87] *Ricci*, 129 S. Ct. at 2690-91 (Ginsburg, J., dissenting). In making this assertion, the dissent looked to congressional reports which revealed greater discrimination in the municipal sector, particularly in fire and police departments, than in the private sector. *Id.* at 2690. The dissent then pointed to data from the City demonstrating a disparity between minority percentages in the general population relative to the percentage of minority firefighters. *Id.* at 2691. The dissent argued that only litigation quelled this disparity. *Id.*

[88] *Id.* at 2693.

[89] *Id.* at 2691-95. In challenging the weighting of the written and oral portions of the examination, the dissent asserted that the percentage weight assigned to each portion of the exam had no correlation to job performance, but was merely a provision of the City's agreement with the firefighters' union. *Id.* at 2691. *But see supra* note 72 and accompanying text. The dissent relied on results from the nearby city of Bridgeport, which found that changing the weights to favor the oral portion of the exam not only bore a closer relation to "real-life scenarios," but also resulted in greater success for minority candidates. *Ricci*, 129 S. Ct. at 2693 (Ginsburg, J., dissenting). Furthermore, the dissent pointed to the testimony of Christopher Hornick, which indicated that assessment centers better identified the best possible candidates for the job and had less of a racially disparate impact. *Id.* at 2694. These facts stand in stark contrast to those emphasized in the majority. *See supra* note 72 and accompanying text.

[90] *Ricci*, 129 S. Ct. at 2696 (Ginsburg, J., dissenting).

[91] *Id.*

[92] *Id.* at 2696-98; *see also supra* Part II.B (discussing the facts and holdings of *Griggs* and *Albemarle*).

and disparate impact as adversarial prohibitions.[93] The dissent, however, asserted that *Griggs*, *Albemarle*, and subsequent codifications harmonize the two doctrines, giving each equal force.[94]

After declaring disparate treatment and disparate impact as partners in achieving equal employment opportunity, the dissent asserted an alternative rule: where an employer has good cause to believe that a particular employment practice would not withstand scrutiny for business necessity, its decision to set aside the practice does not constitute disparate treatment.[95] Having proposed its own standard, the dissent began its assault on the majority's use of the strong-basis-in-evidence standard.[96]

First, the dissent distinguished *Wygant* and *Croson* from the instant case.[97] Secondly, the dissent argued that the strong-basis-in-evidence standard essentially requires an employer to prove itself in violation of Title VII's disparate-impact provision before it may take action to remedy the situation.[98] Lastly, the dissent invalidated the majority's reasoning that the strong-basis-in-evidence standard protects an employee's reasonable reliance on the testing practice.[99]

The dissent then applied its alternative standard to the facts and found that the disparity in the test results and the availability of equally valid, less discriminatory alternatives demonstrated that the City had good cause to believe it would

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[93] *Ricci*, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).

[94] *Id.* The dissent refers to the disparate-treatment and disparate-impact provisions of Title VII as "twin pillars," which "advance the same objectives." *Id.*

[95] *Id.*

[96] *Id.* at 2701.

[97] *Id.; see also supra* Part II.C (discussing the facts and holdings of *Wygant* and *Croson*). The dissent reasoned that *Wygant* and *Croson* involved employment decisions that were solely race-based. *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting). Conversely, employers like those in the instant case are not engaging in race-based tactics; they are merely avoiding disparate-impact liability. *Id.*

[98] *Id.* at 2701-02.

[99] *Id.* at 2702. The dissent stated that it is not reasonable for an employee to rely on an exam that has a disparate impact and is not related to job performance. *See id.*

be subject to disparate-impact liability.[100] The dissent concluded by refuting Justice Alito's concurring opinion.[101]

## IV. DISCUSSION

The Supreme Court's decision in *Ricci v. DeStefano* has both immediate intrigue and deep implications for the future. The fact-intensive nature of the case is readily apparent.[102] The majority and dissent presented strikingly opposing interpretations of the facts, particularly with regard to the questions of whether the exam was job related and whether equally valid, less discriminatory testing alternatives existed.[103] Furthermore, Justice Alito's concurrence introduced facts that tended to demonstrate pretext, a matter absent from the majority's analysis and only addressed in rebuttal from the dissent.[104] The issue of pretext is a critical element of disparate-treatment analysis under *McDonnell Douglas*.[105] Yet, despite the divergent views of the facts and the presence of evidence raising a question of pretext, the Court granted summary judgment rather than remanding the case for hearing by a trier of fact.[106]

The Court additionally took the novel approach of applying a constitutional standard to a statutory claim.[107] In so doing, the Court limited the circumstances in which an employer can utilize race-based remedial measures to comply with the Title VII disparate-impact provision.[108] An employer's race-based remedial actions are defensible under the second prong of *McDonnell Douglas* only if the employer is able to meet the much elevated

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[100] *Ricci*, 129 S. Ct. at 2703-07 (Ginsburg, J., dissenting); *see also supra* note 89 and accompanying text (discussing the validity of alternative test methods).

[101] *Ricci*, 129 S. Ct. at 2707-10; *see also supra* Part III.C (encapsulating Justice Alito's concurring opinion). The dissent argued that even if the Mayor and his officials were operating under the pretext of disparate-impact liability, the CSB was an independent board. *Ricci*, 129 S. Ct. at 2707-08.

[102] *See supra* Part I.

[103] *See supra* notes 72, 89 and accompanying text.

[104] *See supra* notes 82-86, 101 and accompanying text.

[105] *See supra* Part II.A, note 33 and accompanying text.

[106] *See supra* note 70 and accompanying text.

[107] *See supra* notes 64-65 and accompanying text; *see also supra* Part II.C (discussing the equal protection origin of the strong-basis-in-evidence standard).

[108] *See supra* note 68 and accompanying text.

strong-basis-in-evidence standard.[109] This standard effectively places employers in the precarious position of either facing a disparate-impact suit or admitting to discriminatory testing procedures.[110] The result is an erosion of the disparate-impact doctrine in light of Congress's express intent to give Title VII's disparate-impact provision effect.[111]

On the horizon is the unanswered question of whether Title VII's disparate-impact provision is constitutional.[112] The *Ricci* Court expressly refused to extend its holding to a constitutional claim of discrimination under the Equal Protection Clause.[113] Yet Justice Scalia warned that the day is approaching when the question must be answered.[114] The majority suggested that when that day comes, a higher standard than that imposed by *Ricci* will apply.[115] The imposition of a higher standard could completely extinguish Title VII's disparate-impact provision.[116]

With the Court presently divided five to four on the issue of whether disparate treatment and disparate impact are at odds, the future of disparate impact with regard to its constitutionality hinges on the theory of equality predominating the Court at the time the question is posed.[117] If the colorblind theory of equality continues to prevail, disparate impact will likely not withstand constitutional scrutiny. On the other hand, if the majority of the Justices adopt the remedial theory of equality present in the dissent, disparate impact may yet survive.

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[109] *See supra* notes 62-65 and accompanying text; *see also supra* Part II.A, note 32 and accompanying text (discussing business justifications for race-based employment actions under *McDonnell Douglas*).

[110] *See supra* note 98 and accompanying text.

[111] *See supra* notes 38-39 and accompanying text.

[112] *See supra* Part III.B.

[113] *See supra* note 67 and accompanying text.

[114] *See supra* Part III.B.

[115] *See supra* note 67 and accompanying text.

[116] *See supra* Part III.B.

[117] *See supra* notes 93-94 and accompanying text; *see also* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 16, 23 (2001) (describing both the colorblind and remedial theories of equality). The colorblind theory of equality prohibits race from being a factor in employment decisions, regardless of motive; whereas the remedial theory of equality seeks to right past wrongs by "compensat[ing] for present disadvantages." RUTHERGLEN, *supra*, at 16-17, 23.

## CONCLUSION

In *Ricci v. DeStefano*, the Supreme Court held that before employers may take race-based remedial action to cure a practice that has a disparate impact, the employer must have a strong basis in evidence to believe that failure to use the race-conscious remedy will result in exposure to disparate-impact liability. Through its decision, the Court dramatically narrowed the instances in which an employer may use race-based remedies to comply with Title VII. Although the question remains open as to whether Title VII's disparate-impact provision is constitutional, it is apparent that the majority's decision weakened the doctrine of disparate impact.

*Nathan L. Barrett*[*]

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[*] J.D. Candidate, University of Mississippi School of Law, 2011; B.S., Purdue University, 2000. I thank my Savior, the Lord Jesus Christ, for the gift of legal scholarship. All of the glory goes to Him. Second only to Christ, I thank my wife, Kari Sue Barrett, for her deep love and unending encouragement without which I would not be where I am today. Thank you to my mother, Teresa A. Noah, for guiding me through the spiritual battlefield. Thanks goes as well to Professor William W. Berry, III for imparting his expertise in employment discrimination law on a newcomer to the field. This note is dedicated to my grandparents, Joe and Thelma McCreary. Thank you for your Christian example.

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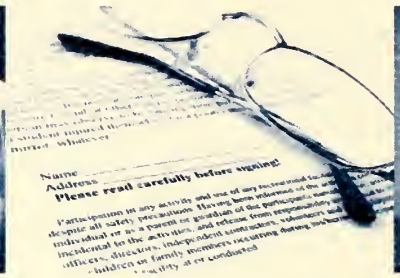

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